Supreme Court, U.S.
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No. 99-

IN THE

Supreme Court of the United States

THO VAN HUYNH,

Petitioner,

v.

STACY L. KING, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT THE SECOND PAT-DOWN SEARCH OF PETITIONER THO VAN HUYNH WAS JUSTIFIED EVEN THOUGH THE FIRST PAT-DOWN (PERFORMED MINUTES EARLIER) WAS THOROUGH AND REVEALED NO WEAPONS?

II. WHETHER THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT THE ILLEGALLY SEIZED EVIDENCE FROM THE SECOND PAT-DOWN SEARCH WOULD INEVITABLY HAVE BEEN DISCOVERED WHEN HUYNH WAS ARRESTED ON AN OUTSTANDING CALIFORNIA WARRANT FOR INDECENT EXPOSURE GIVEN THAT THE STATE DID NOT PRODUCE ANY EVIDENCE THAT SUCH A WARRANT IN FACT EXISTED?

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Petitioner Tho Van Huynh respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals (App. A), district court (App. B), and magistrate judge's report, recommendation, and order (App. C) to be reviewed are unreported. Prior reported decisions in this matter are *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996) (App. D), *Huynh v. State*, 257 Ga. 375, 359 S.E.2d 667 (1987) (App. E), and *Huynh v. State*, 258 Ga. 663, 373 S.E.2d 502 (Ga. 1988) (App. F).

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on January 10, 2000. This Court's jurisdiction rests on 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS INVOLVED IN THE CASE

Not applicable.

STATEMENT OF THE CASE

1. *Statement of Facts Material to Consideration of the Questions Presented.*

This appeal arises out of the conviction of Petitioner Tho Van Huynh, a Vietnamese immigrant, in connection with the murder of Ca Nguyen. As will be set forth more fully below, after Huynh's trial, newly discovered evidence came to light. Doc. 6; Exh. G - pg. 501. The admitted triggerman, Sam Van Ngo, pled guilty to malice murder and armed robbery and testified that Huynh was not involved in and had no prior knowledge of the murder of Nguyen. Doc. 6; Exh. 6G -- pps. 492, 501. Ngo testified that he alone was involved in the murder of Nguyen. Doc. 6; Exh. 6G - pg. 501.

In December 1985, Huynh lived in an apartment with his girlfriend, Tammy Bennett, and Hong Binh Thai, a sixteen-year-old Vietnamese immigrant whom Huynh helped support. Doc. 6; Exh. 6E - pg. 55; Doc. 6, Exh. 6F - pg. 474. Co-indictee and admitted triggerman Sam Van Ngo and the victim, Ca Nguyen, lived with several other Vietnamese immigrants in a house. Doc. 6; Exh. 6F - pps. 482-83.

Ngo testified that he knew at the time of the robbery and murder that Nguyen was in possession of a large amount of money. On December 18, 1985, Nguyen had depleted his savings account by withdrawing the entire balance of $12,497.67 and had bought a ticket for travel to Seattle on December 20. Doc. 6; Exh. 6F - pg. 400; Doc. 6; Exh. 6E - pps. 213-14. Ngo testified that he did not tell Huynh or Hong Binh Thai about his travel plans, nor did he tell the two about Nguyen's money. Doc. 6; Exh. 6G - pps. 492, 498, 501, 508. Similarly, Huynh and Hong Binh Thai testified that they knew nothing about the travel plans or Nguyen's bank withdrawal. Doc. 6; Exh. 6F - pps. 468, 470-71. In trial testimony, Ngo admitted that Huynh and Thai were not involved in his plan to rob Nguyen and had no prior knowledge of his plans. Doc. 6; Exh. 6G - pps. 492, 501. In the hearing on his guilty plea to malice murder, Ngo admitted that he alone was involved in the murder and robbery of Nguyen. *Id.* at 501.

On December 20, 1995, the date of the robbery and murder, Huynh hosted a small gathering at his apartment for his birthday. Ngo testified that he had previously been to Huynh's apartment and had seen where Huynh stored his .25 caliber handgun. Doc. 6; Exh. 6F -- pps. 485-86; Doc. 6; Exh. 6G - pg. 504. Ngo testified that he stole Huynh's handgun when the only guest then present, Hong Bing Thai, left the main room to go to the bathroom. *Id.*

Huynh agreed to give Ngo a ride to his apartment to retrieve his luggage and then a ride to the airport. Doc. 6; Exh.

6F - pps. 437-41; Doc. 6; Exh. 6G - pps. 525-26, 547-48. While at Ngo's apartment, Ngo sat on the floor next to Nguyen and began a quiet conversation neither Huynh nor Hong Bing Thai could hear. Doc. 6; Exh. 6F - pps. 440-41; Doc. 6; Exh. 6G - pps. 554-55. Huynh and Hong Binh Thai then heard a loud noise and turned to see that Ngo had shot Nguyen in the head at close range. *Id.* at 441-42; 527, 555.

After the shooting, Ngo ordered Hong Binh Thai to help him carry Nguyen's body to Huynh's car and then ordered Huynh to drive them to a remote location in Forsyth County to dispose of Nguyen's body. Doc. 6; Exh. 6F - pg. 470; Doc. 6; Exh. 6G - pps. 490-91, 498, 520, 527. Ngo testified that Huynh and Hong Bing Thai followed Ngo's orders because they were afraid of the gun after witnessing Nguyen's murder. Doc. 6; Exh. 6G - pg. 498. Similarly, Huynh and Hong Binh Thai testified that they acted out of fear for their lives. Doc. 6; Exh. 6F - pg. 472; Doc. 6; Exh. 6G - pps. 528, 557-58.

Ngo allowed Huynh to go back to his apartment but instructed Hong Bing Thai to accompany him to the airport. Doc. 6; Exh. 6F - pps. 453-54; Doc. 6; Exh. 6G - pps. 530-31, 565. Huynh testified that he did not call the police because he was terrified that Ngo would either try to kill him or harm Hong Bing Thai if Huynh told others about the murder and robbery. Doc. 6; Exh. 6G - pps. 530-31, 566. At the airport, Ngo gave Hong Bing Thai $4,000 in $100 bills from the money stolen from Nguyen. Doc. 6; Exh. 6F - pg. 473; Doc. 6; Exh. 6G - pg. 492. When Hong Binh Thai returned from the airport, he gave Huynh $2,000 of this money. Doc 6; Exh. 6F - pps. 473-492. Huynh testified that he knew the source of the money and refused to spend it but agreed to keep the money on behalf of Hong Binh Thai.

Huynh testified that he remained in Gainesville for several days, paralyzed by fear over Nguyen's murder and afraid that he would be implicated. Doc. 6; Exh. 6G - pg. 532. On

December 22, Huynh, Bennett, and Hong Binh Thai left Gainesville for Fremont, California, where members of Huynh's family lived. Doc. 6; Exh. 6G - pg. 533.

Several weeks later, Huynh and Bennett attempted to register Huynh's car with the California Department of Motor Vehicles ("DMV"). Doc. 6; Exh. 6F - pps. 254. DMV officials asked Huynh to wait while his license was being processed. *Id.* at 256-57. James Seitz, a DMV investigator, testified that Huynh's car registered a "hit" on the NCIC, a national computer database of vehicles involved in crimes. Seitz asked Huynh to continue waiting; meanwhile, he called the Fremont Police Department and contacted law enforcement officials in Hall County, Georgia to obtain further information. Doc. 6; Exh. 6F - pps. 254-57.

Fremont Police Officers Kerry Wooldridge and Robert Revel received a call from their dispatcher, instructing them to report to the DMV. Tr. at 9-10.[1] The dispatcher informed Officers Wooldridge and Revel that someone had attempted to register a car suspected to be involved in a Georgia homicide. Tr. at 9-11, 85-86.

Officer Revel was the first to arrive at the DMV. Tr. at 11. Officer Revel testified that Huynh and Bennett made no effort to leave when they saw him arrive in uniform; they merely kept their seats. Tr. at 86. Officer Revel met with Seitz, who informed him that there was an NCIC hit on Huynh's car, which indicated that the car may have been involved in a Georgia homicide. Tr. at 87.

Shortly thereafter, Officer Wooldridge arrived at the DMV. Tr. at 11. Officer Wooldridge spoke with Seitz and Officer Revel and learned of the NCIC hit on Huynh's car. Tr.

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[1] The district court clerk has not assigned document or volume numbers to the transcript of the March 11, 1998 hearing before Magistrate Strother. References to the March 11, 1998 hearing shall be cited herein as "Tr. ___."

at 13. Seitz and Officer Wooldridge brought Huynh and Bennett into Seitz's office. Tr. at 89. Huynh identified himself, giving the officers his correct name. Tr. at 89.

Officer Wooldridge then performed a pat-down search of Huynh. Tr. at 15. Officer Wooldridge had been a police officer for five years at that time and, based on his own testimony, had performed hundreds or thousands of pat-down searches. Tr. at 21, 29. Officer Wooldridge took pat-down searches seriously; he testified that if he missed something during a pat-down search, he, his partner, or a member of the public could be killed. Tr. at 28-29. At the time Officer Wooldridge searched Huynh, he was aware that Huynh might be a suspect in a murder case. Tr. at 30. Thus, Officer Wooldridge patted Huynh down from his neck to his toes. Tr. at 54. Indeed, Officer Wooldridge testified that he looked for "any weapons, small. Any type of small caliber weapon. Mace, a sharp object, knife, homemade weapon, anything of that nature." Tr. at 48. Despite this exacting search and his heightened concern because Huynh was a murder suspect, Officer Wooldridge did not find any weapons. *See* Tr. at 49.

After the first pat-down search, Officers Wooldridge and Revel spoke by telephone with Detective Mefferd of the Georgia Bureau of Investigation. Tr. at 15, 90. Mefferd told Officer Wooldridge that a .25 caliber weapon was involved in the Georgia murder. Tr. at 49. Mefferd also informed the officers that the Georgia murder involved a large amount of money in $100 bill denominations. Tr. at 108-09.

After the conversation with Mefferd, Officer Wooldridge asked Officer Revel to perform a second pat-down search. Tr. at 90. While performing that search, Officer Revel felt a bulge in Huynh's right rear pants pocket. Tr. at 91. Officer Revel testified that he thought the bulge was a wallet, which might contain a gun. Tr. at 91. He reached into the pocket and pulled

out a business card holder, approximately 1 1/2 by 2 1/2 inches long. Tr. at 92.

Officer Revel admitted that once he pulled out the business card holder, he knew that it was not a weapon. Tr. at 93. Nevertheless, he seized thirteen $100 bills from the wallet.[2] Tr. at 94-95. Officers Wooldridge and Revel then arrested Huynh. Huynh's arrest report lists the arresting crimes as Possession of Stolen Property and False Evidence of Registration. Tr. at 68. Officer Wooldridge admitted in his testimony before the district court that he had no reason to believe that Huynh's car was stolen. Tr. at 69. Officer Wooldridge also testified that he had no reason to believe that Huynh presented improper paperwork when registering his car. Tr. at 69.

In the district court proceeding nearly 12 years after Huynh's conviction, Officer Revel testified that Huynh was arrested on an outstanding California warrant for indecent exposure. Tr. at 129. The arrest report does not support this testimony, and the government did not produce the alleged warrant at the evidentiary hearing. *See* Tr. at 71. Moreover, although Officer Revel testified in Huynh's two jury trials, he never testified that Huynh was arrested for indecent exposure. Tr. at 138. Finally, Huynh testified in his evidentiary hearing that he had never been charged or arrested in California for indecent exposure. Tr. at 147.

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[2] The Georgia Supreme Court, at times, mistakenly stated that the officers seized thirty-one, rather than thirteen, $100 bills from Huynh. As the Eleventh Circuit explained in Huynh's first habeas appeal, however, "[t]his appears to have been an erroneous description of the amount of money recovered from Huynh's wallet. In actuality, the police found $1,300.00 in his wallet immediately before arresting him." *Huynh v. King*, 95 F.3d 1052, 1057 n.4 (11th Cir. 1996).

2. *Summary of the Stage of Proceedings and Manner of Raising Questions Below.*

On April 14, 1986, the grand jury for Hall County, Georgia indicted Tho Van Huynh ("Huynh") and Sam Van Ngo ("Ngo") for the December 20, 1985 malice murder, felony murder, and armed robbery of Ca Nguyen ("Nguyen"). On October 17, 1986, the jury convicted Huynh of malice murder and armed robbery but did not return a guilty verdict on the felony murder charge. *See Huynh v. State*, 257 Ga. 375, 375, 359 S.E.2d 667, 668 (1987).

While Huynh's direct appeal and motion for new trial were pending, newly discovered evidence came to light. Specifically, Ngo pled guilty to malice murder and armed robbery and admitted that he shot and killed Nguyen. Doc. 6G - pg. 501. Ngo also signed an affidavit stating that: (i) Ngo – not Huynh – shot, killed, and robbed Nguyen; (ii) Huynh and Hong Bihn Thai (a juvenile also present at the scene who faced criminal charges for his involvement) had absolutely no prior knowledge that Ngo intended to kill and rob Nguyen; and (iii) any involvement by Huynh and Hong Bihn Thai after the murder was procured solely out of fear for their lives. *See* Amended Motion for New Trial. Huynh filed an amended motion for new trial based on the newly discovered evidence. *Huynh v. State*, 257 Ga. 375, 376 n. 1, 359 S.E.2d 667, 668 n. 1 (1987).

The trial court held that Huynh's notice of appeal divested it of jurisdiction over Huynh's amended motion but construed the motion as an extraordinary motion for new trial on the grounds of newly discovered evidence "so material that it would probably produce a different verdict." Trial Court Order (January 13, 1987), at 3 (quoting *Lee v. State*, 146 Ga. App. 189, 192, 245 S.E.2d 878, 880 (1978)). The trial court granted Huynh's motion, noting that "the State's case-in-chief

consisted entirely of circumstantial evidence," and Ngo's testimony "would probably produce a different verdict." *Id.*

Huynh was retried on November 16-20, 1987, for all three counts of the indictment, including the felony murder count that did not result in a guilty verdict at his first trial. *See Huynh v. King*, 95 F.3d 1052, 1055 (11th Cir. 1996).[3] During the second trial, the State introduced no direct evidence or additional circumstantial evidence establishing Huynh's intentional participation in the murder and armed robbery. Nevertheless, the second jury convicted Huynh on all three counts of malice murder, felony murder, and armed robbery. Huynh received two consecutive life sentences for these convictions. *Huynh v. State*, 258 Ga. at 664, 373 S.E.2d at 502.

On direct appeal, the Supreme Court of Georgia held that Huynh was subjected to double jeopardy when he was retried for felony murder after not being found guilty of that offense in the first trial. 258 Ga. at 664, 373 S.E.2d at 503. Accordingly, the Court reversed Huynh's conviction for felony murder. The Supreme Court of Georgia affirmed Huynh's two remaining convictions as well as the two consecutive life sentences he received for them. *See id.* at 664.

On December 5, 1989, Huynh filed a petition for writ of habeas corpus in the Superior Court of Dodge County, Georgia. *See Huynh v. King*, 95 F.3d 1052, 1055 (11th Cir. 1996). Huynh's petition alleged that he was denied effective assistance of counsel because his attorney failed to file a timely motion to suppress evidence obtained through an illegal search

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[3] Huynh's habeas petition has previously been before the Eleventh Circuit. The Eleventh Circuit granted Huynh's petition with respect to his armed robbery conviction. *Huynh v. King*, 95 F.3d at 1061. The Eleventh Circuit remanded Huynh's remaining habeas claim to the district court for an evidentiary hearing on a limited Fourth Amendment issue. *Id.* at 1058. Huynh appeals from the district court's denial of his petition affirmed by the Eleventh Circuit.

and seizure when such a motion would have been meritorious.[4] *Id.* On August 12, 1991, the state habeas court denied Huynh's petition, and the Supreme Court of Georgia denied an application for probable cause to appeal on January 29, 1992. *See Huynh v. King*, 95 F.3d at 1055.

On March 24, 1992, Huynh filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Georgia, Gainesville Division. Doc. 1. Huynh's petition asserted three grounds for habeas relief: ineffective assistance of counsel; insufficiency of evidence to support his conviction for malice murder; and double jeopardy. Doc. 1 – pps. 4-5. On July 27, 1992, the magistrate judge issued his report, recommending that the petition be denied on all three grounds. Doc. 12. On March 11, 1993, the district court adopted the magistrate judge's recommendation. Doc. 16. The district court granted the motion for certificate of probable cause to appeal on April 13, 1993. Doc. 20.

Huynh appealed the district court's decision to the Eleventh Circuit on March 26, 1993. Doc. 19. The Eleventh Circuit granted the writ of habeas corpus as to Huynh's armed robbery conviction, holding that double jeopardy barred the conviction. *Huynh v. King*, 95 F.3d at 1061. With respect to Huynh's ineffective assistance of counsel claim, the Eleventh Circuit held that Huynh's counsel's decision to delay filing of the potentially meritorious suppression motion was objectively unreasonable. *See id.* at 1057. The Eleventh Circuit held that "if the district court finds, following the evidentiary hearing on the prejudice prong of Huynh's ineffective assistance of counsel claim, that the second pat-down search of Huynh

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[4] Huynh's trial counsel testified in a habeas hearing that although he believed the motion to suppress had merit, he made a strategic decision to file the motion just before trial in order to preserve the Fourth Amendment claim for what he believed would be more favorable review in the state appellate and federal habeas courts. *See Huynh v. King*, 95 F.3d at 1056-57.

leading to the discovery of the thirteen $100 bills violated his Fourth Amendment right and that, consequently, this evidence should have been suppressed at trial, then Huynh was prejudiced by his lawyer's failure to file a motion to suppress the evidence." *Id.* at 1058-59. Accordingly, the case was remanded to the district court for an evidentiary hearing on this issue. *Id.* at 1058.

After the remand, on November 21, 1997, Judge O'Kelley referred Huynh's petition to Magistrate Strother. Doc. 29. On March 11, 1998, Magistrate Strother held an evidentiary hearing on the Fourth Amendment issue. At that hearing, Officers Wooldridge and Revel, the police officers who searched Huynh, testified. Huynh also took the stand. *See* Tr. at 146-147. On January 29, 1999, Magistrate Strother issued his Report, Recommendation, and Order ("Magistrate's Report") regarding Huynh's habeas claims. In his Report, Magistrate Strother found that the first and second pat-down searches were justified under *Terry v. Ohio*, 392 U.S. 1 (1968). Magistrate's Report, at pps. 6-10. The Magistrate found, however, that the second pat-down search exceeded the permissible scope of a *Terry* search and thus violated Huynh's Fourth Amendment rights. Magistrate's Report, at pps. 11-15 ("[E]ven if a legitimate protective search placed Revel in the position to observe a one-hundred dollar bill inside the card holder, he was not authorized under *Terry* to remove and seize its contents because he had no probable cause. And, in the absence of probable cause, his seizure of the currency was invalid.").

Despite this finding, Magistrate Strother concluded that Huynh did not have a meritorious suppression motion because the currency seized from his wallet during the second pat-down search would inevitably have been discovered when Huynh was arrested on an outstanding California warrant for indecent exposure. Magistrate's Report, at pg. 16. The State never produced such a warrant, nor did it introduce any evidence or

testimony regarding the alleged warrant in Huynh's trials and hearings over the previous twelve years. *See* Tr. at 142. Moreover, the arrest report listed the arresting crimes as Possession of Stolen Property and False Evidence of Registration, not indecent exposure. Tr. at 68. Nevertheless, Magistrate Strother found that the warrant existed based on the testimony of Officers Wooldridge and Revel during the habeas hearing. Magistrate's Report, at pg. 16. Based on this testimony, Magistrate Strother recommended that the district court deny Huynh's petition. Magistrate's Report, at pg. 17.

Huynh's counsel filed objections to the Magistrate's Report on February 11, 1999. On March 5, 1999, the district court adopted the Magistrate's Report and denied Huynh's petition for writ of habeas corpus. Huynh filed a timely notice of appeal on April 2, 1999. Huynh also filed a Request for Certificate of Appealability in the district court. On May 21, 1999, the district court granted Huynh's Request for Certificate of Appealability. *See* Order of May 21, 1999 ("Because the California warrant was never entered into evidence, the court finds that reasonable jurists could disagree on whether petitioner was arrested on a prior warrant.").

The Eleventh Circuit accepted the appeal, construing the certificate of appealability as a certificate of probable cause to appeal all issues presented in Huynh's federal habeas petition. *Huynh v. King*, No. 99-10311, at p. 6, n. 4 (11th Cir., Jan. 10, 2000). On appeal, Huynh raised the following issues: (1) whether the district court erred in holding that the second pat-down search was justified even though the evidence conclusively established that the first pat-down (performed minutes earlier) was thorough and revealed no weapons; and (2) whether the district court erred in holding that the illegally seized evidence would inevitably have been discovered when Huyn was arrested on an oustanding California warrant for indecent exposure given that the State did not produce any evidence that such a warrant in fact existed. *Id.* Without the

benefit of oral argument, the Eleventh Circuit issued a per curiam, non-published opinion affirming the District Court's Order on January 10, 2000. Huynh currently remains incarcerated in the Ware Correctional Institute in Waycross, Georgia.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT THE SECOND PAT-DOWN SEARCH OF PETITIONER THO VAN HUYNH WAS JUSTIFIED EVEN THOUGH THE FIRST PAT-DOWN (PERFORMED MINUTES EARLIER) WAS THOROUGH AND REVEALED NO WEAPONS.

Terry v. Ohio, 392 U.S. 1 (1968), grants a police officer "a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, *when he has reason to believe that he is dealing with an armed and dangerous individual*. . . ." *Id.* at 27 (emphasis added). The relevant inquiry is whether "a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.*

Terry does not grant officers free reign to perform pat-down searches wherever and whenever they like. Rather, an officer's ability to conduct such a search is strictly circumscribed by his reasonable suspicion that the search is justified by safety concerns – "[t]he sole justification of the search in the present situation is the protection of the police officer and others nearby. . . ." *Id.* at 29; *see also Ybarra v. Illinois*, 444 U.S. 85, 92-93 (1979) ("The initial frisk of [defendant] was simply not supported by a reasonable belief that he was armed and presently dangerous, a belief which this Court has invariably held must form the predicate to a patdown of a person for weapons."); *Adams v. Williams*, 407 U.S. 143, 146 (1972) ("The purpose of this limited search is not to

of crime, but to allow the officer to pursue his investigation without fear of violence . . . .").

Accordingly, a *Terry* search is justified only in very narrowly-defined circumstances:

> [W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.

Terry, 392 U.S. at 30.

The Supreme Court has emphasized that police officers must have specific reasons for believing the suspect to be dangerous: "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Id.*

The district court found that the second pat-down search was justified under *Terry* because "[h]aving been informed that petitioner may have been carrying a small weapon that could have been missed in the first search, the officers were justified in executing a second pat down to ensure their own safety." Doc. 43-2. After performing the first pat down, the officers received two new pieces of information from Georgia: (i) that a .25 caliber gun had been involved in the Georgia murder; and

(ii) that the Georgia murder involved a large amount of money in $100 bill denominations. Tr. at 49; 108-09; Doc. 43-2.

The district court's finding that the second pat down was justified because the officers learned that a .25 caliber gun was used in the Georgia murder constitutes clear error. Simple logic dictates that the involvement of a .25 caliber gun in the Georgia murder could not have motivated the officers' second pat down of Huynh. Just minutes before Officer Revel performed the second pat-down search, Officer Wooldridge had performed a thorough pat down of Huynh , specifically designed to uncover any small weapon, that turned up no weapons. *See* Tr. at 15. Officer Wooldridge's search would have revealed any weapon that Huynh may have been carrying.

Indeed, there is no question that Officer Wooldridge's first pat down was thorough. Officer Wooldridge testified that he searched Huynh from his neck to his toes, "looking for any weapons, small. Any type of caliber weapon. Mace, a sharp object, knife, homemade weapon, anything of that nature." Tr. at 48, 54. Officer Wooldridge had every incentive to search Huynh carefully – he knew at the time he performed the search that Huynh might be a suspect in a murder case. Tr. at 30. And, Officer Wooldridge testified that if he fails to discover a weapon during a *Terry* search, he, his partner, or a member of the public could die. Tr. at 28, 31. Under these circumstances, it is clear that Officer Wooldridge's search was thorough, that he would have discovered any weapon on Huynh's person, and that Officer Wooldridge concluded the search only when satisfied that Huynh posed no danger to him, his partner, or a member of the public.

After Officer Wooldridge's search revealed no weapons, Officer Revel had no reason to suspect that Huynh was armed and presently dangerous. Officer Revel testified that Officer Wooldridge is generally thorough in performing pat-down searches. Tr. at 107. Furthermore, Officer Revel had never

told Officer Wooldridge that he should be more careful in performing pat downs, nor had he complained to others about Officer Wooldridge's pat downs. Tr. at 107-08.

As this testimony makes clear, the officers did not decide to perform the second pat down because they had a reasonable suspicion that Huynh was armed and presently dangerous. Rather, they subjected Huynh to a second search because they had just learned that the Georgia murder suspect might be in possession of a large amount of money in $100 bill denominations. It was only after receiving this information that Officer Revel performed the second pat down, removed Huynh's wallet from his pocket, and removed $100 bills from the wallet. *See* Tr. at 108-109.

Thus, the second pat down was a search for evidence, not for weapons. A search for evidence under the pretext of a search for weapons violates the Fourth Amendment. *See generally Biegel v. State*, 787 P.2d 577, 578 (3rd Div. Wash. Ct. App. 1990) ("Once it is ascertained that no weapon is involved, the State's limited authority to invade the individual's right to be free of police intrusion is spent. Thereafter, further intrusion becomes a search for evidence. . . ."); *see also Wyatt v. State*, 151 Ga. App. 207, 210 (1979).

Viewing the evidence as a whole, the officers' testimony that the second pat down was a search for weapons rather than a search for currency is simply not credible. The district court abused its discretion in holding that the second search was justified, and the Court of Appeals erred in affirming this holding.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S HOLDING THAT THE ILLEGALLY SEIZED EVIDENCE FROM THE SECOND PAT-DOWN SEARCH WOULD INEVITABLY HAVE BEEN DISCOVERED WHEN HUYNH WAS ARRESTED ON AN OUTSTANDING CALIFORNIA WARRANT FOR INDECENT EXPOSURE GIVEN THAT THE STATE DID NOT PRODUCE ANY EVIDENCE THAT SUCH A WARRANT IN FACT EXISTED.

Although the district court adopted Magistrate Strother's finding that the officers violated Huynh's Fourth Amendment rights, it denied Huynh's habeas petition on the grounds that Huynh "was arrested on an outstanding California warrant, and incident to that arrest, the currency would have been found." Doc. 43 - pg. 3. The district court's finding relied on the officers' testimony that Huynh was arrested not based on the evidence seized from his wallet or his possible involvement in a homicide, but rather on an outstanding California warrant for indecent exposure. *See* Doc. 43 – pps. 3-4. The district court's finding is an abuse of discretion because: (i) the officers' testimony constitutes nothing more than an after-the-fact pretextual explanation for an illegal search and seizure; and (ii) the officers' testimony before the district court demonstrates that they are not credible witnesses. The Eleventh Circuit's opinion did not explicitly address these arguments or the portions of the officers' testimony demonstrating their lack of credibility. Rather, the Eleventh Circuit's opinion relied on the officers' testimony as to the existence of the unsubstantiated warrant which was never produced and held that the inevitable discovery rule applied.

A. *The State Never Established the Existence of the Alleged Warrant, and the Officers Testimony Constitutes Nothing More than an After-the-Fact Pretextual Explanation.*

The State had numerous opportunities over the past twelve years to present evidence that Huynh was arrested on a California warrant. In two jury trials, the State presented evidence regarding the officers' detention of Huynh and his subsequent arrest. The State did not, however, even suggest that Huynh was arrested on an outstanding warrant for indecent exposure. *See* Tr. at 142-43. And, Officer Revel, who now so clearly recalls the alleged warrant, was a witness at both of those trials. *See* Tr. at 140-42.

The holding of the courts below allows the State to justify an otherwise illegal search based on an unsubstantiated warrant, first mentioned twelve years after Huynh's arrest. At the habeas hearing before Magistrate Strother, the State failed to introduce the alleged warrant. Further undermining the officers' claim that Huynh was arrested for indecent exposure, Huynh's arrest report lists the arresting crimes as possession of stolen property and false evidence of registration, not indecent exposure.[5] Tr. at 68-69.

Moreover, Huynh testified in the habeas hearing that he had never been arrested in California for indecent exposure. Tr. at 147. The State could have impeached this testimony by introducing a copy of the alleged arrest warrant had such a warrant existed. Its failure to do so speaks volumes.

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[5] Significantly, the crimes listed on the arrest report are another example of the officers' resort to pretext; Officer Wooldridge admitted that he had no reason to believe Huynh presented false evidence of registration or that his car was stolen. *See* Tr. at 69.

B. *The Officers' Testimony in the Habeas Hearing Demonstrates that They Are Not Credible Witnesses.*

The district court found credible the officers' testimony that Huynh was arrested on an outstanding warrant for indecent exposure even though the arrest report itself contradicted this testimony. *See* Doc. 43 – pps. 3-4. Without discussing the credibility issue, the Eleventh Circuit relied on the officers' testimony regarding the existence of the warrant. *Huynh v. King*, No. 99-10311, at pp. 19-20 (11th Cir. Jan. 10, 2000). The issue before this Court is whether the Eleventh Circuit erred in upholding the district court's order crediting the officers' testimony under the clear error standard. Although establishing clear error is a high burden, here the officers' testimony in the habeas hearing conclusively demonstrated that they were not credible witnesses.

For example, on direct examination, Officer Wooldridge took great efforts to describe his initial pat-down of Huynh as a "cursory" or "light" search. *See* Tr. at 15. Officer Wooldridge's specific testimony was as follows:

> Q: Could you describe what the first pat-down, what your pat-down of the Petitioner consisted of, how did you conduct it?
>
> A: Well, it was a light, cursory, pat search, upper torso. I didn't remove anything from his person. I'm not sure if I checked his ankles. I probably did, you know, legs and stuff. But I know it was a light, modified, controlled search.

Tr. at 34-35. This testimony was obviously intended to explain why the officers subjected Huynh to a second pat-down search when the first search revealed no weapons.

When Huynh's counsel further questioned Officer Wooldridge on this issue, however, his testimony changed dramatically:

> Q: You knew that if this was indeed a murder suspect, he might still have a weapon on him; right?
>
> A: Yes, sir.
>
> Q: You did not perform a light pat-down, did you?
>
> A: I'm not going to go into techniques, but, no, I did not. I performed a pat-down search, heavy or whatever.
>
> . . .
>
> Q: You weren't doing this in any kind of cursory fashion, were you?
>
> A: No.

Tr. at 46-47.

The officers' testimony regarding the reason they arrested Huynh further underscores their lack of credibility. The police report states that Huynh was arrested for possession of stolen property and false evidence or registration. *See* Exh. 1 to Transcript of March 11, 1998 hearing.[6] On cross examination, Officer Wooldridge admitted that he had no reason to believe Huynh had committed these offenses:

> Q: Now, at the time under the Code sections for why he was arrested, Mr. Van Huynh, it says possession of stolen property, right?
>
> A: Yes, sir.

---

[6] The district court has not assigned document or volume numbers to the exhibits to the transcript from this hearing.

Q: It says false evidence. In the second charge it says false evidence of registration, right?

A: Yes, sir.

Q: It doesn't say anything about the indecent exposure, does it?

A: No, sir.

Q: Now, in fact, the car that was there, it was Mr. Van Huynh's car, right?

A: Yes, sir.

Q: Mr. Van Huynh had the proper paperwork, right?

A: I don't know. I can't recall.

Q: You didn't have any reason to believe he didn't have the proper paperwork, did you?

A: No, sir.

Q: You had no reason to believe that it was a stolen car?

A: No, sir.

Tr. at 68-69.

As these examples demonstrate, the officers simply were not credible witnesses. Accordingly, the district court committed clear error by crediting their testimony, and the Eleventh Circuit had ample evidence before it to reverse on this ground.

CONCLUSION

For the reasons set forth herein, Huynh's Fourth Amendment motion was meritorious. Accordingly, the failure of Huynh's trial counsel to file a timely motion to suppress constituted ineffective assistance of counsel, and the Court should grant Huynh's petition and order his conviction vacated.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99-10311
Non-Argument Calendar

D.C. Docket No. 92-00055-2-CV-WCO

THO VAN HUYNH

Petitioner-Appellant,

versus

STACY L. KING, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia

Filed: January 10, 2000

Before EDMONDSON, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

Tho Van Huynh ("Huynh") appeals the district court's denial of his petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. Huynh was convicted of armed robbery and malice murder. He raises two issues on appeal: (1) whether the district court properly concluded that the second pat-down search was justified and (2) whether the district court properly applied the inevitable discovery exception and concluded that the evidence seized from Huynh would have been inevitably

discovered. For the reasons that follow, we AFFIRM the district court's judgment.

I. BACKGROUND

Huynh was convicted of malice murder and armed robbery of C.A. Nguyen. The facts concerning the crime and the evidence against Huynh are set out in *Huynh v. State,* 359 S.E. 2d 667, 668 n. 1 (Ga. 1987) (*"Huynh I"*).[1] He was granted a motion for a new trial based on newly discovered evidence.[2] On retrial, Huynh was convicted of felony murder, malice murder, and armed robbery, and was sentenced to consecutive life sentences for malice murder and armed robbery. *See Van Huynh v. State,* 373 S.E.2d 502, 502 (Ga. 1988) (*"Huynh II"*). The Georgia Supreme Court reversed his conviction for felony murder but affirmed his convictions and sentence for malice murder and armed robbery. *Id.* at 503.[3]

Huynh petitioned for a writ of habeas corpus in state court. *See Huynh v. King,* 95 F.3d 1052, 1055 (11th Cir.1996) (*"Huynh III"*). The state court denied his habeas petition and the Georgia Supreme Court denied his application for probable cause to appeal. *See id.* at 1055.

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[1] The State objects to the Georgia Supreme Court's statement that, at the time of Huynh's arrest, "he had thirteen one hundred dollar bills on his person." *Huynh I,* 359 S.E. at 669. The State contends that the trial testimony showed that Huynh had thirty-one, and not thirteen, one hundred dollar bills. As discussed further in this opinion, we find this distinction to be irrelevant.

[2] Before moving for a new trial, Huynh appealed his conviction, and while his motion for new trial was pending, his conviction was affirmed by the Georgia Supreme Court. *Huynh II,* 373 S.E.2d at 502, n.1.

[3] Huynh's felony murder conviction was reversed based on a finding that he had been subjected to double jeopardy since he was found not guilty of felony murder during his first trial. *Id.* at 503.

Huynh filed a § 2254 petition for writ of habeas corpus in district court. *See id.* The district court denied the petition but granted Huynh's motion for a certificate of probable cause to appeal. *See id.* On appeal, we found that Huynh had shown that his counsel's decision to delay filing a potentially meritorious motion to suppress was neither sound strategy nor reasonable in light of prevailing professional norms. *See id.* at 1055-1059, 1061. Accordingly, we vacated the district court's order as to Huynh's ineffective assistance of counsel claim, and remanded for an evidentiary hearing to resolve whether Huynh was prejudiced by his counsel's performance. *See id.* We found the evidence sufficient to support Huynh's conviction for malice murder but concluded that Huynh's conviction for armed robbery subjected him to double jeopardy and that the crime of armed robbery merged into the crime of malice murder in Huynh's particular case. *See id.* at 1059. We, therefore, reversed the district court's judgment as to the double jeopardy claim, and directed that the writ issue on the armed robbery conviction and sentence. *See id.*

On remand, the magistrate judge held an evidentiary hearing on the suppression issue in order to determine prejudice. During the hearing, the court heard testimony from Huynh and from the police officers who searched him. The magistrate judge subsequently recommended that the habeas petition be denied. The magistrate judge found that the first and second pat-down searches were justified but that the second search violated the Fourth Amendment by exceeding the permissible scope. *See* R2-40 at 11-15. However, the magistrate judge concluded that Huynh's suppression motion was not meritorious because the currency seized from his wallet during the second search would have been inevitably discovered when he was arrested on an outstanding warrant. *See id.* at 16. Over Huynh's objection, the district judge adopted the magistrate judge's report and recommendation and

denied the habeas petition. *Id.* at 42, 43. Huynh appealed, and moved for a certificate of appealability. *Id.* at 44, 45. The district court granted a certificate of appealability on the issue of "whether petitioner was arrested on a prior warrant." *Id.* at 48.[4]

II. DISCUSSION

The issue remaining before this Court is whether a reasonable probability exists that, but for Huynh's counsel's unprofessional conduct in failing to file a timely motion to suppress the money found in Huynh's wallet at the time of his arrest, the result of the proceeding would have been different. *See Huynh III,* 95 F.3d at 1058. In *Huynh III,* we concluded that, Huynh could prove prejudice as a matter of law if the district court found both that Huynh's Fourth Amendment right was violated by the second search, and that a timely motion to suppress this evidence would have been granted. *See id.* We noted that, if the money would have likely been suppressed, prejudice would follow because the money was "extraordinarily important in sustaining the prosecution's theory that Huynh intentionally participated in a plan to murder Nguyen from the outset." *Id.* Huynh argues that the district court erred in holding that the officers had a reasonable suspicion to justify the second pat-down search.

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[4] Because Huyhn filed his petition for writ of habeas corpus before the April 24, 1996, effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), the proper procedural route for permission to appeal was a certificate of probable cause instead of a certificate of appealability. *See Hardwick v. Singletary,* 122 F.3d 935, 936, (11th Cir.) (*"Hardwick I"*), *modified on reh'g* 126 F.3d 1312, 1313, (1997) (*"Hardwick II"*). We, therefore, construe the grant of a certificate of appealability as a grant of a certificate of probable cause to appeal all issues presented in the petitioner's federal habeas petition. *Hardwick II,* 126 F.3d at 1313.

Following Nguyen's murder, Huynh received $2,000 from Hong Binh Thai. *See Huynh II,* 373 S.E.2d at 503. Thai had received the money from Sam Van Ngo, who had stolen the money from the victim, Ca Nguyen. *See id.* at 502-03. Huynh subsequently left Georgia for Fremont, California, where members of his family lived. *See* Resp't. Ex. 6G at 533.

After arriving in California, Huynh attempted to register his car. *See* Resp't. Ex. 6F at 253-57. Huynh was asked to wait after the California Department of Motor Vehicles' ("DMV") national computer database revealed that the car was suspected as having been involved in a Georgia homicide. *See id.* at 257. While Huynh waited, a DMV investigator contacted the Fremont California Police Department. *See id.* at 256-57.

Fremont Police Officer Steven Revel arrived, saw Huynh waiting, and met with the investigator who confirmed that the car was suspected as having been involved in a Georgia homicide. *See* 86-87; Resp't's Ex. 3. Officer Kerry Wooldridge arrived next and met with Revel and the investigator, who confirmed the information about the car. *See* R3-11-13, 30, 42; Resp't's Ex. 3. The officers asked Huynh to go into an office where, upon request, Huynh provided them with his name. *See* R3-14, 19, 61, 89. Wooldridge then performed a pat-down search of Huynh. *See* R3-15, 19, 34, 42, 45-48, 52, 54, 87-88; Resp't's Ex. 1 and 3.

After the pat-down search, Wooldridge called Huynh's name into California dispatch by radio, and Revel and Wooldridge spoke with Detective Tommy Nefferd of the Georgia Bureau of Investigation. *See* R3-15, 20, 36, 43, 61-63, 90, 108, 136; Resp't's Ex. 3. Nefferd told Revel that the Georgia murder involved several hundred dollar bills and advised Revel and Wooldridge that a .25 caliber weapon had been used in the homicide. *See* R3-108, 116; Resp't's Ex. 3. Nefferd requested that Wooldridge detain Huynh pending a

teletype instructing them to arrest him. *See* R3-50, 52, 55-59, 62-64, 69-70, 73, 77, 79; Resp't's Ex. 1. Wooldridge had been a police officer for five years, had been trained on pat-down searches, and knew that a .25 caliber weapon is fairly small and can be missed in a pat-down search. *See* R3-21-23, 28, 35-36, 49.

While speaking with Nefferd, Wooldridge told Revel that he was not satisfied with the pat-down search of Huynh that he had performed and asked Revel to perform another search. *See* R3-15-16, 35, 39, 49-50, 90, 107, 127-128, 142; Resp't's Ex. 3. Revel understood that the requested second pat-down search was to be a search for weapons. *See* R3-136, 143. From a bulletin that he had seen during his police training, Revel knew of a weapon called a "wallet gun" that had dimensions similar to a business card folder. *See* R3-91, 94, 98, 101, 113, 120, 125; Resp't's Ex. 2 and 3. While performing the second pat-down search of Huynh, Revel felt a rectangular bulge in the right rear pocket of Huynh's pants. R3-16, 38, 43, 47, 90-92, 128, 142; Resp't's Ex. 3. Revel reached into the pocket and pulled out a "little leather case that folded in half." *See* R3-92, 142; Resp't's Ex. 3. Upon pulling out the case, Revel and Wooldridge saw a wad of bills sticking out of it. *See* R3-38, 93-95, 128. Revel could plainly see that the first bill in the pile was a one-hundred dollar bill but could not initially see the denominations of the remaining bills. *See id.* at 94. As Revel

examined the contents of the case, he found several one-hundred dollar bills.[5] *See id.* at 16, 38, 93-95; Resp't's Ex. 3.

About this time, Wooldridge learned that there was an outstanding California warrant for Huynh. *See* R3-36, 43, 50-52, 58, 61-62, 70-71, 73. Huynh was placed under arrest for the California warrant. *See id.* at 17, 36, 50, 58, 62, 67-68, 73-80, 83, 95-96, 129, 132, 137-38; Resp't's Ex. 1 and 3. Although the California warrant was neither referenced on Wooldridge's Police Report nor admitted as evidence, the supplement reports, completed by each officer on the day of the arrest, indicated that Huynh was "placed under arrest for a 314 P.C. warrant....Refer to report number 96108035 for additional details" and Wooldridge testified that the California arrest

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[5] At the evidentiary hearing, Revel testified that there were 31 one-hundred dollar bills. *See* R3-95; 137; Resp't's Ex. 3. This testimony is consistent with Revel's trial testimony. During the trial, Revel testified that the State's Exhibit 40, "the wad of currency that was folded inside the billfold that I removed from the subject's pocket" was "thirty-one one hundred dollar bills." Resp't Ex. 6F at 272; *see also id.* at 281-82 ("There were thirty-one one hundred dollar bills in the middle of [the billfold]...."). The currency was tendered as evidence. *See id.* at 278; Resp't's Ex. 6G at 687. Fremont Officer David Jenson testified that he had processed and maintained custody of the evidence, and identified Exhibit 40 as "a stack of currency; one hundred dollar bills. There are thirty-one hundred dollars in one hundred dollar bills." *Id.*, Resp't's Ex. 6F at 284-85, 288-89. In arguing a motion to suppress, counsel for both Huynh and the State described the currency as thirty-one one-hundred dollar bills. *See id.* at 300-02.

In his post-hearing brief, Huynh's counsel argued that only thirteen one-hundred dollar bills were seized. *See* R2-37, n. 2. However, during closing argument at the evidentiary hearing, Huynh's counsel stated that "we are talking about 31 one hundred dollar bills. I know that there has been some confusion in the record about whether it is 13 one hundred dollar bills or 31 one hundred dollar bills. It doesn't really matter." R3-149. In the post-hearing reply brief, Huynh's counsel conceded that "the number of bills is simply irrelevant" R2-39 at 2. We agree and find that the issue of whether the quantity was thirteen or thirty-one one hundred dollar bills is irrelevant.

warrant was served on Huynh that day. R3-3-67, 70-83; Resp't's Ex. 1. Revel's report states that "a local records check revealed an outstanding warrant for Huynh's arrest, (refer to FPD report #60108035). At Officer Wooldridge's request I transported Huynh to the Fremont City Jail and booked him on the local warrant." Resp't's Ex. 3. Revel and Wooldridge testified that, if Huynh had not already been searched twice, the usual practice would have been to perform a second pat-down search before he was placed in the patrol car. *See id.* at 37, 131-32. This sequence of events took less than fifteen minutes. *See* R3-66-67.

A. Justification for the Second Pat-Down Search

In an appeal from the denial of habeas corpus, we review *de novo* questions of law and mixed questions of law and fact, including ineffective assistance of counsel claims, and the factual findings of the district court for clear error. *Sims v. Singletary,* 155 F.3d 1297, 1304 (11th Cir. 1998).

Under *Terry v. Ohio,* a police officer may conduct a pat-down search of a suspicious person to determine whether the person is in fact carrying a weapon when the officer is "justified in believing that the individual...is armed and presently dangerous to the officer or to others." 392 U.S. 1, 24, 88 S.Ct. 1868, 1881, 20 L.Ed.2d 889 (1968). The officer's belief that the individual is armed and dangerous may be justified by reliable information that the officer has received from a third-party if the information is immediately verifiable at the scene. *See Adams v. Williams,* 407 U.S. 143, 146-47, 92 S.Ct. 1921, 1923-24, 32 L.Ed.2d 612 (1972). Such a search is "not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence... "*id.* at 146, 92 S. Ct. at 1923, and is "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby," *Terry,* 392 U.S. at 26, 26 S. Ct. at

1882. *See also Ybarra v. Illinois* 444 U.S. 85, 94, 100 S. Ct. 338, 343, 62 L.Ed.2d 238 (1979) ("The 'narrow scope' of *Terry* does not permit a frisk for weapons on less than reasonable belief or suspicion directed at the person to be frisked..."). We find that there is no proscription against a second search to ensure officer safety as long as the scope and duration of the actual detention is itself permissible. *See Florida v. Royer,* 460 U.S. 491, 499-500, 103 S. Ct. 1319, 1325 L.Ed.2d 229 (1983) ("such a search is limited to the person of the arrestee and the area immediately within his control and...must be carefully tailored to its underlying justification."; *see also Terry,* 392 U.S. at 29, 88 S. Ct. at 1884-1880 ("The sole justification of the search in the present situation is the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer.") A second search is invalid and does not fall within the contours of a legal *Terry* search where it is not aimed at or limited to the discovery of weapons. *See United States v. Taylor,* 997 F.2d 1551, 1554 (D. C. Cir. 1993) (citing *Minnesota v. Dickerson,* 508 U.S. 366, 373, 113 S. Ct. 2130, 2136, 124 L.Ed.2d 334 (1993)). Justification for a second search has been found where the second search is done "almost immediately" after the first and where the initial search "may have been insufficient." *See United States v. Monroe,* No. Crim. A. 96-104-SLR, slip op. (D. Del. May 19, 1997) (refusing to suppress evidence seized during a second search performed after questioning revealed that the defendant further matched the suspect).

When the officers arrived at the Fremont DMV office, they were both notified that Huynh's automobile was suspected as having been involved in a Georgia homicide. Therefore, it was reasonable that Wooldridge conducted the first pat-down search on Huynh.

Wooldridge testified that, after receiving new information concerning the suspected use of a .25 caliber handgun in the homicide, he was concerned that he might have missed a small handgun in his initial search. Wooldridge knew that a .25 caliber weapon is a small weapon which could be missed in a pat-down search. Revel knew that a "wallet gun" has dimensions similar to a business card folder. Therefore, based on the officers' training and experience, they had a reasonable suspicion that a bill holder could contain a .25 caliber handgun. By conducting the second search, the officers were attempting to dispel a suspicion supported by specific and articulated facts. Thus, the second search was permissible under *Terry*.

B. The "Inevitable Discovery" of the Evidence

Huynh contends that the currency seized during the second pat-down search would not have been "inevitably discovered" because the existence of an outstanding California warrant was not established and the officers' testimony was not credible.

For evidence to qualify for admission under the "inevitable discovery rule," "there must a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued *prior* to the occurrence of the illegal conduct." *United States v. Satterfield,* 743 F.2d 827, 846 (11th Cir. 1984) (citing *United States v. Brookins,* 614 F.2d 1037 (5th Cir. 1980) (emphasis in original)), *cert. denied,* 471 U.S. 1117, 105 S. Ct. 2362, 86 L.Ed.2d 262 (1985),; *Nix v. Williams,* 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 281 L.Ed.2d 377 (1984).

Although the outstanding California warrant was not introduced into evidence, the fact of its existence was established at the hearing. Both officers testified that they had arrested Huynh based on this warrant, and referenced the

warrant in the separate reports which they each prepared on the day of the arrest. In the reports, the warrant was referred as a "314 P.C. warrant" and by a separate report number. Based on this evidence, it does not appear that the district court clearly erred in finding that the money found in Huynh's bill holder would have been "inevitably discovered." *Cf. United States v. Prim*, 698 F.2d 972, 974-75 (9th Cir. 1983) (finding that search was not justified where officers testified that, while they were aware of an outstanding warrant, they searched the defendant based on a suspicion of narcotics trafficking).

III. CONCLUSION

Based on our finding that the second pat-down search was justified and that the money would have been "inevitably discovered," Huynh is unable to show prejudice from his attorney's decision to delay filing a motion to suppress. Therefore, the district court's denial of his petition for writ of habeas corpus is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

THO VAN HUYNH,	:	
Petitioner,	:	CIVIL NO.
	:	2:92-CV-55-WCO
v.	:	
	:	HABEAS CORPUS
STACY L. KING, Warden,	:	28 U.S.C. § 2254
Respondent.	:	

Filed: March 5, 1999

ORDER

This case is before the court for consideration the magistrate judge's report and recommendation ("R&R") dated January 29, 1999 [40-1]. The magistrate judge recommends that the instant petition for writ of habeas corpus be denied. Petitioner has filed objections to the R&R. *See* 28 U.S.C. § 636(b)(1). This court's review of the R&R reveals that the R&R contains a thorough discussion of the facts and procedural history of this case. Therefore, in the interest of judicial economy, this court will not restate the facts of this case.

Petitioner lodges two objections to the R&R. First, petitioner asserts that the officers did not have a reasonable suspicion to justify the second pat-down search. Second, petitioner contends that the found currency is not subject to the inevitable discovery exception to the exclusionary rule because the officers' claim that they arrested petitioner on an outstanding California warrant is pretextual. The court will address each contention in turn.

Petitioner argues that the first pat-down search had been thorough and that the officers initiated a second pat-down search after having been informed that petitioner was a Georgia murder suspect who may be in possession of a large amount of money in $100 denominations. Thus, petitioner argues, the circumstances indicate that the officers were looking for evidence rather than weapons in violation of *Terry v. Ohio,* 392 U.S. 1, 30 (1968).

The court rejects petitioner's argument. In *Terry,* 392 U.S. at 24, the Supreme Court held that "[w]hen an officer is justified in believing that an individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others," he may conduct a limited search of the outer clothing in an attempt to discover weapons. In *Adams v. Williams,* 407 U.S. 143, 147 (1972), the Court extended *Terry* to situations where other reliable persons supply the information leading to the reasonable cause for the stop and frisk.

In the instant case, although Officer Wooldridge performed a careful pat-down search, the officers had subsequently been informed by a Georgia detective that the petitioner was a murder suspect who may possess a large amount of money and may be carrying a .25 caliber weapon. Having been informed that petitioner may have been carrying a small weapon that could have been missed in the first search, the officers were justified in executing a second pat-down to ensure their own safety. *See United States v. Monroe,* Crim. No. 96-104-SLR, 1997 W.L. 309397 (D. Del. May 19, 1997) ("The court is not aware of any authority that stands for the proposition that an officer who performs a patdown search cannot perform a second patdown when he or she believes the first one was insufficient."); *cf. United States v. Taylor,* 997 F.2d 1551, 1554 (D.C. Cir. 1993) (holding that a second pat-down search

violated *Terry* because it was not aimed at or limited to the discovery of weapons).

Second, petitioner asserts that no outstanding California warrant existed at the time of his arrest to justify the arrest and any subsequent search, which would have inevitably led to the discovery of the currency. For unlawfully obtained evidence to qualify for admissibility under the inevitable discovery exception to the exclusionary rule, "there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct." *United States v. Satterfield,* 743 F.2d 827, 846 (11th Cir. 1984); *see Nix v. Williams,* 467 U.S. 431, 444 (1984).

In the instant case, the evidence showed that petitioner was arrested on an outstanding California warrant, and incident to that arrest, the currency would have been found. Although the California warrant was not introduced into evidence, both the police report and supplemental report made at the time of petitioner's arrest refers to this outstanding warrant. Resp. Ex. 1, 2. In addition, the testimony of the officers indicated that they had arrested petitioner on the basis of this outstanding warrant. Tr. 36, 52, 58, 62.

Accordingly, the court finds that the R&R is correct as to both law and fact. The court hereby ADOPTS the magistrate judge's R&R and DENIES the instant petition for writ of habeas corpus.

IT IS SO ORDERED this 5th day of March, 1999.

/s/ William C. O'Kelley
WILLIAM C. O'KELLEY
Senior United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THO VAN HUYNH,	:	
Petitioner,	:	CIVIL ACTION NO.
	:	2:92-CV-55-WCO
v.	:	
	:	HABEAS CORPUS
STACY L. KING, Warden,	:	28 U.S.C. § 2254
Respondent.	:	

Filed: January 29, 1999

ORDER FOR SERVICE OF REPORT AND RECOMMENDATION

Attached is the report and recommendation of the United States Magistrate Judge made in this action in accordance with 28 U.S.C. § 636 and this Court's Local Rule 72.1. Let the same be filed and a copy, together with a copy of this Order, be served upon the parties.

Pursuant to 28 U.S.C. § 636(b)(1), each party may file written objections, if any, to the report and recommendation within ten (10) days of the receipt of this Order. Should objections be filed, they shall specify with particularity the alleged error or errors made (including reference by page number to the transcript if applicable) and shall be served upon the opposing party. The party filing objections will be responsible for obtaining and filing the transcript of any evidentiary hearing for review by the district court. If no objections are filed, the report and recommendation may be adopted as the opinion and order of the district court and any

appellate review of factual findings will be limited to a plain error review. *United States v. Slay,* 714 F.2d 1093 (11th Cir. 1983), *cert. denied,* 464 U.S. 1050, 104 S.Ct. 729, 79 L.Ed.2d 189 (1984).

The Clerk is directed to submit the report and recommendation with objections, if any, to the district court after expiration of the above time period.

IT IS SO ORDERED, this 29 day of January, 1999.

/s/ John R. Strother Jr.

JOHN R. STROTHER, JR.
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THO VAN HUYNH, Petitioner,	:	CIVIL ACTION NO. 2:92-CV-55-WCO
v.	:	
STACY L. KING, Warden, Respondent.	:	HABEAS CORPUS 28 U.S.C. § 2254

Filed: January 29, 1999

MAGISTRATE JUDGE'S REPORT, RECOMMENDATION AND ORDER

The Petitioner, Tho Van Huynh, a Georgia state prisoner currently incarcerated in the Ware State Prison in Waycross, Georgia, filed instant *pro se* petition for a writ of habeas corpus under 28 U.S.C. § 2254 on March 24, 1992, challenging the constitutionality of his 1987 Hall County, Georgia malice murder and armed robbery convictions [Docket No. 1].

A. *Introduction*

On March 11, 1993, the District Judge entered a written Order adopting this Court's Report and Recommendation of July 27, 1992, and denied relief on all claims presented in the petition. An appeal of that Order followed.

On appeal, the Court of Appeals for the Eleventh Circuit reversed the denial of the Petitioner's Sixth and Fourteenth Amendment ineffective assistance of counsel claim involving trial counsel's failure to file a timely Motion to Suppress evidence retrieved pursuant to a search of the Petitioner by Fremont, California Police Officers at the time of his January

8, 1986, arrest. *Huynh v. King*, 95 F.3d 1052 (11th Cir. 1996). The Eleventh Circuit remanded the case and directed that an evidentiary hearing be held to determine "whether the search in question violated Huynh's Fourth Amendment right." *Id.* at 1058.

The Court of Appeals further held that an affirmative finding on this Fourth Amendment issue would be dispositive of the Petitioner's ineffective assistance of counsel claim. *Id.* at n. 6. Based on its determination that the money seized from the Petitioner immediately prior to his arrest was critical to the prosecution's case at trial, the Court of Appeals concluded that exclusion of the money on Fourth Amendment grounds creates a reasonable probability that the trial would have been different, thereby satisfying the prejudice component of the two-prong test articulated in *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). *Id.* at 1058-59. Accordingly, in light of the Court of Appeals' holding, this Court's analysis shall be confined to whether a meritorious Fourth Amendment challenge to evidence obtained prior to the Petitioner's arrest was available to trial counsel.[1] A hearing was held on this matter on March 11, 1998. The Petitioner was represented by counsel. Present at the hearing, as witnesses on behalf of the Petitioner, were Officers Kerry Wooldridge and Steven Revel of the Fremont, California Police Department. (Transcript of March 11, 1998, Evidentiary Hearing) (hereinafter "EH").

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[1] Although the Petitioner's trial counsel filed a Motion to Suppress, he filed it "on the eve of Huynh's retrial" and the trial court dismissed it as untimely. *Huynh*, 95 F.3d at 1055. The Georgia Supreme Court affirmed this ruling finding that the suppression motion was untimely and therefore defective under Georgia law. *Van Huynh v. State*, 373 S.E.2d 502, 503 (Ga. 1988). Thus, no court, including the trial court, has conducted a hearing on the issue of suppression and the Petitioner's untimely raised Fourth Amendment claims.

B. *The January 8, 1986, Search, Seizure and Arrest of the Petitioner in Fremont, California*

On January 8, 1986, Officers Wooldridge and Revel of the Fremont, California Police Department responded (separately) to a call originating from the California Department of Motor Vehicles (hereinafter "DMV") concerning the registration of a motor vehicle suspected of involvement in a Georgia crime. (EH 8-11).[2] Each officer was informed by radio that a routine computer check of the vehicle the Petitioner was attempting to register led to a National Crime Information Center ("NCIC") "hit," indicating involvement in a homicide or other felony in Georgia. (EH 13, 87). The officers each drove to the DMV.

Upon arrival, the officers received additional confirmation of this information from DMV Officer Seitz. (EH 13). The officers approached both Huynh and a female later identified as Tammie Bennett and escorted them to an office in the DMV building. (EH 14). At that point, Officer Wooldridge performed a pat-down search of both Huynh and Bennett. (EH 15). Wooldridge's professed basis for the first pat-down search was for his own safety: he knew of Huynh's suspected involvement in a Georgia homicide and wanted to ensure that he did not have a concealed weapon on his person. (EH 30-33). Wooldridge's search of the Petitioner was negative for weapons or other contraband.

Wooldridge then spoke by telephone with Georgia Detective Nefferd who conveyed his suspicions that a .25

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[2] At the original trial, Revel was informed by the dispatcher of the vehicle's potential involvement in a Georgia homicide. (EH 85-86). Wooldridge also conceded at the evidentiary hearing that he was aware of Huynh's suspected involvement in a Georgia homicide at the time he conducted the initial pat-down search. (EH 31). As discussed below, information indicating the Petitioner's involvement in a violent Georgia felony are relevant to whether the pat-down searches were justified.

caliber weapon was used in the Georgia homicide at issue and that the Petitioner might have such a weapon concealed on his person. (EH 35). Upon receipt of this information, Wooldridge asked Revel to conduct a second pat-down search of the Petitioner because he was concerned that he might have initially missed such a small weapon. (EH 35-36, 90-91).

Revel initiated a search of the Petitioner and came across a "bulge" or rectangular object in his right-rear pants pocket. (EH 91). Revel asserted that, as a result of past training and information, he was aware that a .25 caliber weapon, or "wallet gun," might be concealed in such an object. (EH 91). Upon the removal of the business card holder from the Petitioner's pocket, he immediately determined that it did not contain a weapon. Revel observed, that it contained a "wad" of folded one-hundred dollar bills inside, which he claimed were partially exposed, or "readily identifiable." (EH 93-95; Respondent's Ex. 6F, pp. 281-284). He proceeded to open it and examine its contents. (EH 93). He then seized all thirty-one of the bills from the holder. *Id.*

After Revel conducted the second search and seized the bills, the Fremont Police Department notified Wooldridge as to the existence of an outstanding California arrest warrant for the Petitioner's arrest on indecent exposure charges. (EH 36, 50). Wooldridge testified that, as part of a "routine check," he provided the Petitioner's name and other information to the department by radio at the beginning of the detention and, later, received notification of the outstanding warrant. (EH 51-52). And, although Wooldridge planned on waiting for confirmation of probable cause for Huynh's arrest from Nefferd (in the form of a teletype), he elected to arrest him on the basis of the California warrant. (EH 50). Wooldridge further testified that, irrespective of any further information concerning the Petitioner's involvement in the Georgia crime, he would have

arrested the Petitioner on the basis of the outstanding California warrant. (EH 52).

1. ***First Pat-down Search***

With regard to the first pat-down search of the Petitioner performed by Wooldridge, the Court finds that this initial limited intrusion was justified under the circumstances. Under *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d (1968), when a police officer may "reasonably conclude in light of his experience that criminal activity may be afoot...," the officer may stop the suspicious person and make "reasonable inquiries." *Id.* at 30, 88 S.Ct. at 1884. When the officer is "justified in believing that the individual is...armed and presently dangerous to the officer or to others," the officer may conduct a pat-down search "to determine whether the person is in fact carrying a weapon." *Id.* at 24, 88 S.Ct. at 1881.

The justification for such a limited intrusion, also know as a protective search, is that of officer safety. *Id.* It is "not to discover evidence of crime, but to allow the officer to pursue his investigation without fear of violence...." *Adams v. Williams,* 407 U.S. 143, 145-46, 92 S.Ct. 1921, 1922-23, 32 L.Ed.2d 612 (1972). Thus, a "Terry search" must be "limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby." *Terry,* 392 U.S. at 26, 88 S.Ct. at 1882.

Here, prior to arriving at the Fremont DMV office, both officers received information concerning Huynh's potential involvement in a Georgia homicide or other felony. This information was confirmed not only by the DMV official who Wooldridge contacted upon his arrival, but also by a Georgia Detective by telephone. (EH 13, 44, 87). Because it is reasonable and logical to suspect an individual of being armed under these circumstances, the first pat-down search by Wooldridge was justified under *Terry. See Florida v. Royer,*

460 U.S. 491, 498-499, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983) (plurality opinion) (A temporary detention for questioning is justified when the officer has reasonable suspicion "of illegal transactions in drugs or of any other serious crime.").

2. *Whether the Second Pat-Down Search Was Justified Under the Circumstances*

The Respondent contends that Nevel's second protective search was justified under *Terry* in light of new information the officers received from Georgia, i.e., that authorities suspected the use of a .25 caliber handgun in the homicide at issue. (EH 49). Although Wooldridge testified that he performs pat-down searches very carefully since his safety and the safety of those around him would be jeopardized if he were to miss a weapon (Eh 28-29), he was concerned that he might have missed a small handgun. (EH 49-50). He asserted that he searched the Petitioner from his neck down to his toes but that he might have missed a small weapon in his crotch area. (EH 49-50, 54-55).

The Court finds Wooldridge's testimony and professed explanation for requesting the second pat-down search of the Petitioner to be credible. Furthermore, while it is difficult to conceive that an experienced and careful police officer would forego a thorough search of a subject purportedly involved in a homicide, there is no legal proscription against such an exercise as long as the scope and duration of the actual detention is itself permissible. *Royer,* 460 U.S. at 498-499, 103 S.Ct. at 1324. As long as the circumstances giving rise to the *Terry* stop and detention were valid, then an officer's effort to ensure that *Terry's* underlying principles, i.e., officer safety, are fulfilled by way of a second inspection is not prohibited. *See Terry,* 392 U.S. at 21, 88 S.Ct. at 1879-80. Here, the officers were attempting to dispel a suspicion supported by specific and

articulable facts. *See United States v. Moore,* 817 F.2d 1105, 1108 (4th Cir.), *cert. denied,* 484 U.S. 965, 108 S.Ct. 456, 98 L.Ed.2d 396 (1987) (a custodial interrogation moves beyond an acceptable *Terry* stop when the stop lasts "longer than necessary to verify or dispel the officer's suspicion."); *accord United States v. Taylor,* 997 F.2d 1551, 1554 (D.C.Cir. 1993) ("[S]econd search of [subject's] pocket did not fall within the contours of a legal *Terry* stop since the second frisk was not aimed at, let alone limited to, the discovery of weapons[,]" and therefore invalid).

Here, the officers initiated a second search based upon specific facts and concerns. After the initial search, the officers received additional information concerning the type of weapon potentially used in the offense. (EH 35). And, Georgia officials, requested that the Petitioner be held pending the transmission of information establishing probable cause for his arrest. (EH 51-52, 55-56). Thus, the Petitioner's continued detention and Wooldridge's conclusion that a second limited *Terry* search was supported by specific and articulable facts.

This Court finds that the length and scope of the Petitioner's continued detention was justified in light of the operative circumstances. Accordingly, a second limited pat-down search of the Petitioner during this detention was appropriate in light of the possibility that, though detained, the Petitioner was still armed. As long as the continued detention was justified, and assuming that the search itself did not exceed *Terry's* permissible scope, there is simply no Fourth Amendment interest compelling suppression of an evidentiary item merely because the item was not detected at the first opportunity. *Rover,* 460 U.S. at 498-499, 103 S.Ct. at 1324; *Taylor,* 997 F.2d at 1554.

Accordingly, the Court finds that the second search of the Petitioner was reasonable under the circumstances and therefore permissible.

3. *Whether the Second Search Exceeded the Permissible Scope of Terry*

While the officers were authorized to conduct a second protective search of the Petitioner, the second search was also subject to *Terry's* rationale and limitations, a limited search for weapons in order to ensure the officers' safety. Accordingly, the second search could be no more intrusive than the first. However, the second search was more intrusive than the first and than authorized by *Terry*. The Court finds that Revel exceeded the permissible limitations of a *Terry* stop by removing the card holder from the Petitioner's pants and removing its contents.

In *Minnesota v. Dickerson*, 508 U.S. 366, 113 S.Ct. 2130, 124 L.Ed.2d 334 (1993), the United States Supreme Court addressed the operation of the "plain view" or "plain feel" doctrine within the scope of a *Terry* stop. At issue in *Dickerson* was a police officer's detection and removal of contraband through a subject's pocket during a valid pat-down search. Though the officer indicated that he could readily identify the substance as cocaine by manipulating it with his fingers, the Court found that such a probing inspection "after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry*" and therefore unauthorized. *Id.* at 377-78, 113 S.Ct. at 2138-39.

Although a search under *Terry* is predicated upon safety, an officer does not have to ignore other contraband that becomes readily apparent to him upon conducting such a search: "If a police officer lawfully pats down a suspect's outer clothing and feels an object whose contour or mass makes its identity immediately apparent, there has been no invasion of

the suspect's privacy beyond that already authorized by the officer's search for weapons." *Id.* at 375, 113 S.Ct. at 2137. The Supreme Court held that if the identify of contraband is "immediately apparent" (and therefore within "plain view" or "plain feel"), then the officer has probable cause to effectuate an arrest. *Id.* at 376-77, 113 S.Ct. 2137-38. If, however, the incriminating nature of the item is not apparent, then the Fourth Amendment prohibits seizure, irrespective of whether the officer is authorized to conduct an initial *Terry* search. *Id.*

Thus, under *Terry* and *Dickerson,* the operative question in this matter is whether, while operating within the confines of a limited pat-down search for weapons, Revel's limited protective search provided probable cause supporting the seizure of evidentiary items, i.e., one-hundred dollar bills. For the following reasons, the Court finds that Revel exceeded the limitations of a proper *Terry* search: (1) because Revel was able to determine that the business card holder did not contain a firearm without removing its contents, and (2) because, even if the Petitioner was justified in opening the card holder, the incriminating nature of the one-hundred dollar bills seized was not immediately apparent.

As confirmed by Revel's trial testimony at the Petitioner's retrial, the business card holder in question was approximately two and one-half inches long and one and one-half inches wide and contained thirty-one one hundred dollar bills. (Respondent's Ex. no. 6F, p. 281; EH 93). Revel testified at trial and at the evidentiary hearing that, upon removing the holder from the Petitioner's back pocket, he could immediately ascertain that the holder did not contain a handgun. (Respondent's Ex. no. 6F, p. 283, EH 93). He proceeded to open the card holder and observed overlapping one-hundred dollar bills inside, he then removed and counted all of the bills. (Respondent's Ex. no. 6F, p. 283-84; EH 93-94).

The Court need not determine whether Revel exceeded *Terry* by removing the card holder from the Petitioner's clothing in the first instance. Revel not only withdrew the holder for inspection but, even after he knew it did not contain a weapon, opened it and removed the contents. His "continued exploration" of the card holder "after having concluded that it contained no weapon was unrelated to the sole justification of the search under *Terry.*" *Dickerson,* 508 U.S. at 377-78, 113 S.Ct. at 2138-39.

Furthermore, unlike drugs or other contraband, currency lacks incriminating features which would otherwise justify a seizure. There is no information to support an immediate determination on Revel's part that the currency observed in the holder was connected to the Georgia homicide. It cannot be said that, given the currency's lack of identifying characteristics and Revel's limited knowledge of the Georgia homicide, the incriminating nature of the currency was "immediately apparent." *See U.S. v. Rutkowski,* 877 F.2d 139, 142 (1st Cir. 1989) (under the "plain view" exception, "the officers' discovery of the object must so galvanize their knowledge that they can be said...to have probable cause to believe the object to be contraband or evidence."): *United States v. Szymkowiak,* 727 F.2d 95 (6th Cir. 1984) (illegal nature of evidence was not immediately apparent where it had to be seized and inspected prior to ascertaining its illegality).

Thus, even if a legitimate protective search placed Revel in the position to observe a one-hundred dollar bill inside the card holder, he was not authorized under *Terry* to remove and seize its contents because he had no probable cause. And, in the absence of probable cause, his seizure of the currency was invalid. *See Arizona v. Hicks,* 480 U.S. 321, 326, 107 S.Ct. 1149, 1153, 94 L.Ed.2d 347 (1987) (seizure of radio invalid where supported by a reasonably articulable suspicion, but not probable cause).

Accordingly, because Revel's seizure of the currency exceeded the permissible scope of his search, it constituted a Fourth Amendment violation. *Id.* at 376-77, 113 S.Ct. 2137-38.

4. *Whether the Currency is Subject to the Inevitable Discovery Exception to the Exclusionary Rule*

Where a protective search exceeds what is necessary to determine whether the suspect is armed, then the search is no longer valid under *Terry* and the evidence derived therefrom must be suppressed. *Terry,* 508 U.S. at 373, 113 S.Ct. at 2136. In the instant case, a finding that the exclusionary rule prohibits introduction of the fruits of Revel's search is tantamount to a finding that Petitioner is entitled to relief on his Sixth and Fourteenth Amendment ineffective assistance of counsel claim. The Court finds that the Petitioner is not entitled to relief, however, because the currency is admissible under the inevitable discovery exception to the exclusionary rule.

Under the inevitable discovery exception to the exclusionary rule, evidence is admissible that otherwise would be excludable if it inevitably would have been discovered by lawful means had the illegal conduct not occurred. *Nix v. Williams,* 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). In *Nix,* the Court reasoned that although the government should not be put in a better position because of its illegal conduct, it should not be put in a worse position because of the conduct either. *Id.* at 443, 104 S.Ct. at 2508.Therefore, "[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means...then the deterrence rationale has so little basis that the evidence should be received." *Id.* at 444, 104 S.Ct. at 2509; *see also United States v. Satterfield,* 743 F.2d 827, 847 (11th Cir. 1984), *cert. denied,* 471 U.S. 1117, 105 S.Ct. 2362, 86 L.Ed.2d 262 (1985) (in order to establish inevitable discovery the prosecution must

show that the police possessed and were actively pursuing the lawful avenue of discovery when the illegality occurred).

Here, regardless of Revel's protective search, the currency would have inevitably been discovered pursuant to a search incident to the Petitioner's arrest on a California warrant. The Court finds that Wooldridge arrested the Petitioner, as a matter of fact, on the basis of an outstanding California warrant for the offense of indecent exposure. (EH 36, 52, 58, 62). A review of both officers' supplemental arrest and incident reports indicates references to this warrant and the offense. (Respondent's Ex. nos. 1 and 2; EH 74-75). And, although the actual warrant was not produced at the evidentiary hearing, the Court finds credible the officers' testimony and their supplemental police reports indicating the basis for the Petitioner's arrest.

Because the Petitioner would necessarily be subject to a complete search incident to his lawful arrest upon a California warrant, the Court finds that the currency in question would have inevitably been discovered and inventoried. Irrespective of whether Revel's search of the Petitioner exceeded *Terry,* the one-hundred dollar bills at issue should not be excluded due to their inevitable discovery. *Nix,* 467 U.S. at 444, 104 S.Ct. at 2509.

Because there is no meritorious basis for suppression, the Petitioner cannot demonstrate the requisite prejudice to support his ineffective assistance of counsel claim. Accordingly, the instant petition must be denied.

CONCLUSION

IT IS THEREFORE RECOMMENDED that the instant petition for writ of habeas corpus be **DENIED.**

IT IS FURTHER ORDERED that the Respondent's Motion for leave to file a supplemental response be

GRANTED, *nunc pro tunc,* May 6, 1998, and the response is accepted as filed on that date.

IT IS SO ORDERED AND RECOMMENDED, this 29 day of January, 1999.

/s/ John R. Strother Jr.

JOHN R. STROTHER, JR.
UNITED STATES MAGISTRATE JUDGE

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APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-8398

THO VAN HUYNH

Petitioner-Appellant,

v.

STACY L. KING, Warden,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Georgia
No. 2:92-cv-55-WCO
William C. O'Kelley, Judge

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95 F.3d 1052; 1996 U.S. App. LEXIS 24900;
10 Fla. Law W. Fed. C 430

September 23, 1996, Decided

COUNSEL: ATTORNEY(S) FOR APPELLANT(S): Christopher R. Crain, ALSTON & BIRD, Atlanta, GA.

ATTORNEY FOR APPELLEE(S): Paula K. Smith, AAG, Atlanta, GA.

JUDGES: Before TJOFLAT, Chief Judge, BIRCH, Circuit Judge, and SMITH,* Senior Circuit Judge.

OPINION BY: BIRCH

OPINION: BIRCH, Circuit Judge:

Tho Van Huynh ("Huynh") appeals the judgment of the district court denying his petition for habeas corpus relief filed pursuant to 28 U.S.C. § 2254. Huynh was convicted of armed robbery, felony murder, and malice murder. He enumerates in his petition three grounds that he contends warrant habeas relief: (1) ineffective assistance of counsel, (2) insufficiency of evidence to support his conviction for malice murder, and (3) double jeopardy. For the reasons that follow, we reverse the district court's order, direct that the writ be granted with respect to Huynh's armed robbery conviction and sentence, and remand for proceedings consistent with this opinion regarding the remaining claims.

I. BACKGROUND

The Georgia Supreme Court made the following factual determinations:

> Appellant and Hong Binh Thai accompanied Sam Van Ngo to his apartment in Gainesville, Georgia. The victim, C.A. Nguyen, lived with Sam Van Ngo and was watching television in the apartment. Soon after their arrival, Sam Van Ngo shot the victim with a .25 caliber automatic weapon of the same model and caliber as one owned by appellant. Hong Binh Thai assisted him in putting the body into the car and in disposing of it in the woods. Appellant drove the car on the trip to dispose of the body.

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* Honorable Edward S. Smith, Senior U.S. Circuit Judge for the Federal Circuit, sitting by designation.

> Over $12,000 which the victim had withdrawn from a savings account was taken from his body by Hong Binh Thai during the drive to the woods. After disposing of the body, they drove to a lake where Sam Van Ngo and Hong Binh Thai threw away the murder weapon and washed their hands. Then they returned to Gainesville where the appellant stayed in the apartment which he shared with Hong Binh Thai while Hong Binh Thai drove Sam Van Ngo to the Atlanta Airport. When Hong Binh Thai returned to Gainesville, he gave appellant two thousand dollars, half of what Sam Van Ngo had given him of the stolen money. Appellant was arrested in California some two weeks after the crimes. At the time of his arrest, he had thirteen one hundred dollar bills on his person.

Huynh v. State, 258 Ga. 663, 373 S.E.2d 502, 502-03 (1988).

Huynh initially was convicted of malice murder and armed robbery on October 17, 1987. After a notice of appeal was filed, the trial court granted Huynh a new trial.[1] Huynh was retried and convicted of felony murder, malice murder, and armed robbery on November 20, 1987, and received consecutive life sentences solely for malice murder and armed robbery. On direct appeal, the Georgia Supreme Court reversed Huynh's felony murder conviction after finding that he had been placed in double jeopardy by being retried for an offense for which he had not been found guilty in the first trial. *See id.* at 503. The court affirmed the remaining convictions as well as the sentences. Huynh filed a petition for habeas corpus in state court alleging ineffective assistance of counsel. The court denied the petition, and the

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[1] Prior to his retrial, the Georgia Supreme Court affirmed Huynh's original convictions. *Huynh v. State*, 257 Ga. 375, 359 S.E.2d 667 (1987).

Georgia Supreme Court denied Huynh's application for a certificate of probable cause to appeal. Huynh next filed a petition for federal habeas corpus relief. The district court found Huynh's claims to be either procedurally barred or lacking in merit and denied relief. In addition, the court granted Huynh's motion for a certificate of probable cause to appeal.

II. DISCUSSION[2]

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

We decline to apply this section retroactively in this case because neither party argues for such an application and because Huynh filed his petition on March 24, 1992, prior to the date on which the Act became effective.

A. Ineffective Assistance of Counsel

On the eve of Huynh's retrial, his counsel filed a motion to suppress the money found in Huynh's wallet at the time of his arrest. Defense counsel argued that the warrantless pat-down search resulting in the discovery of this money

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[2] On April 24, 1996, while this case was pending on appeal, the President signed into law the Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (the "Act"). Title I of the Act significantly curtails the scope of collateral review of convictions and sentences. Specifically, the amended version of 28 U.S.C. § 2254 provides, in pertinent part, that the writ of habeas corpus shall not be granted with respect to any claim adjudicated on the merits in a state court proceeding unless the adjudication of the claim.

exceeded constitutional boundaries. More specifically, counsel maintained that although the police officer who initially frisked Huynh for weapons[3] found none, he then proceeded to conduct a second pat-down search, found a wallet, looked inside, and removed the incriminating evidence. The trial court dismissed the motion as untimely filed. On appeal, the Georgia Supreme Court noted that Georgia's local rules mandate that all motions be filed by the arraignment unless that time is extended by the trial judge. *Van Huynh,* 373 S.E.2d at 503. In his federal habeas corpus petition, Huynh alleged both that the trial court erred in denying his motion to suppress and that trial counsel was ineffective for failing to file the suppression motion in a timely fashion. The district court found that although Huynh had been deprived of a fair opportunity to litigate his Fourth Amendment claim, he had not shown cause for his attorney's failure to file the motion in accordance with the local rules. The court further resolved that counsel's decision to file an untimely motion was strategic and thus did not constitute ineffective assistance.

Huynh's ineffective assistance of counsel claim presents a mixed question of law and fact and is subject to de novo review. *Oliver v. Wainwright,* 782 F.2d 1521, 1524 (11th Cir.), *cert. denied,* 479 U.S. 914, 107 S. Ct. 313, 93 L. Ed. 2d 287 (1986). A claim of ineffective assistance of counsel requires a showing that (1) counsel's representation fell below an objective standard of reasonableness, and (2) a reasonable probability exists that but for counsel's unprofessional conduct, the result of the proceeding would have been different. *Strickland v. Washington,* 466 U.S. 668, 689, 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674 (1984).

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[3] We assume for purposes of this opinion, without deciding, that this warrantless pat-down search for weapons would have been permissible under *Terry v. Ohio,* 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968).

The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential. *Id. at* 689, 104 S. Ct. at 2065. The defendant bears the burden of proving that counsel's performance was unreasonable under prevailing professional norms and that the challenged action was not sound strategy. *Id.* at 688-89, 104 S. Ct. at 2064-65. The Supreme Court explicitly has extended the right to federal habeas review of Sixth Amendment claims to instances in which the alleged ineffective representation necessarily implicates a Fourth Amendment claim. *See Kimmelman v. Morrison,* 477 U.S. 365, 382-83, 106 S. Ct. 2574, 2587, 91 L. Ed. 2d 305 (1986). ("We reject petitioners' argument that [*Stone v. Powell*'s] restriction on federal habeas review of Fourth Amendment claims should be extended to Sixth Amendment ineffective-assistance-of-counsel claims which are founded primarily on incompetent representation with respect to a Fourth Amendment issue. . . . We hold that federal courts may grant habeas relief in appropriate cases, regardless of the nature of the underlying attorney error.").

Huynh raised the issue of ineffective assistance of counsel with respect to the untimely filing of the suppression motion before the state habeas court. At an evidentiary hearing, Huynh's trial counsel, Jim Whitmer, provided the following testimony:

> WHITMER: I know that the general rule is that a Motion to Suppress is supposed to be filed at arraignment or later with permission of the court, but there are also some holdings that say that a lot of things are always discretionary with the trial judge. And so, it wasn't conclusive in my mind that the judge would automatically dismiss it for untimeliness, simply because of when it was filed. I had some expectation that he might consider it. But

in my judgment, we would have an appellate issue either way. If he dismissed it, then we could argue that he should have heard it. And if he heard the motion and denied it, then we could argue that he heard it but should have granted it.

COURT: But you knew the motion was not timely when you filed it without regard to its merit? Is that correct?

WHITMER: Yes, sir.

COURT: And you could have filed it timely had you so chosen?

WHITMER: I could have.

Ex. 2 at 25. Whitmer testified that he felt certain that the police officers who conducted the allegedly illegal search were prepared to fabricate testimony at trial, that the trial court likely would credit their testimony, and that the motion to suppress would ultimately not succeed. A colloquy between Whitmer and Huynh's new counsel, however, also revealed the following testimony:

QUESTION: Mr. Whitmer, you felt that as a matter of truth and facts that the motion was a good one, didn't you?

ANSWER: Yes, sir.

QUESTION: All right. Being the experienced trial lawyer that you are, it was your opinion that if the truth was laid out, that the search was illegal and violated the Fourth Amendment?

ANSWER: Yes, sir ...

QUESTION: The officer probably had the right to conduct the frisk, the Terry-type frisk, that when he extracted the pocketbook from this young man and

got $3,100.00[4] that was allegedly taken from the dead man, that that was definitely illegal and improper?

ANSWER: That was my opinion?

QUESTION: That was your opinion.

ANSWER: Yes.

QUESTION: And that's the reason you filed the motion to suppress evidence?

ANSWER: Yes, sir.

Id. at 18-19. Whitmer also testified that he and his co-counsel had surmised that "perhaps the Eleventh Circuit would view [the motion to suppress] a little bit differently on whether it should have been heard or whether it should have been filed earlier, and so that was essentially the reasons why we filed it when we did." *Id.* at 16.

The state court determined that Huynh's trial counsel had made a-"deliberate strategic and tactical decision to delay the filing of the motion to suppress." Ex. 3 at 2. The district court reviewing Huynh's federal habeas corpus petition similarly concluded that "the motion to suppress was filed simply to give petitioner an additional issue on appeal." R1-12-14.

Our independent review of the record and the applicable decisional law, however, convinces us that the district court erred in its disposition of Huynh's ineffective assistance of counsel claim. In *Kimmelman*, the Supreme Court explicitly denominated as "unreasonable" the precise trial strategy invoked by Huynh's counsel in this case:

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[4] This appears to have been an erroneous description of the amount of money recovered from Huynh's wallet. In actuality, the police found $1,300.00 in his wallet immediately before arresting him.

> No reasonable lawyer would forgo competent litigation of meritorious, possibly decisive claims on the remote chance that his deliberate dereliction might ultimately result in federal habeas review. Furthermore, when an attorney chooses to default a Fourth Amendment claim, he also loses the opportunity to obtain direct review under the harmless-error standard of *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), which requires the State to prove that the defendant was not prejudiced by the error. By defaulting, counsel shifts the burden to the defendant to prove that there exists a reasonable probability that, absent his attorney's incompetence, he would not have been convicted.

477 U.S. at 383 n. 7, 106 S. Ct. at 2587 n. 7.

Placing this discussion in context, we conclude that Huynh's counsel's tactical decision to delay the filing of a potentially meritorious suppression motion in order later to obtain more favorable federal habeas review was objectively unreasonable for several reasons. First, under *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977), the state court's determination that Huynh had failed to abide by a state procedural rule in filing his motion would serve as an adequate and independent state ground to deny relief independent of the merits of the federal claim. *See Coleman v. Thompson*, 501 U.S. 722, 729-30, 111 S. Ct. 2546, 2554, 115 L. Ed. 2d 640 (1991). Huynh therefore would have procedurally defaulted his Fourth Amendment claim, barring our review of the claim unless he could demonstrate cause for the default and prejudice arising therefrom or that failure to consider the claim would result in a fundamental miscarriage of justice. *Id.* at 750, 111 S. Ct. at 2565. Cause to overcome the procedural default bar would be established in this instance if Huynh could show ineffective assistance of

counsel. As the Supreme Court expressly articulated, however, no competent lawyer would choose deliberately to "set up" an ineffective assistance of counsel claim whereby that lawyer's own incompetence would serve as cause for defaulting a claim. *See Kimmelman*, 477 U.S. at 383 n. 7, 106 S. Ct. at 2587 n. 7. Second, Huynh would have the extraordinarily weighty burden of showing prejudice arising from his counsel's ineffective assistance. *See id.* Third, any consideration of Huynh's Fourth Amendment claim, standing alone, necessarily would be barred by the doctrine announced in *Stone v. Powell*, 428 U.S. 465, 482, 96 S. Ct. 3037, 3052, 49 L. Ed. 2d 1067 (1976) ("Where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.") In this circuit, we have construed *Stone v. Powell* to bar consideration of a Fourth Amendment claim if the state has provided an opportunity for full and fair litigation of the claim "whether or not the defendant employs those processes."[5] *Caver v. Alabama* , 577 F.2d 1188, 1192 (5th Cir.1978). Again, our precedent would preclude consideration of Huynh's Fourth Amendment claim unless he were able to overcome the bar of procedural

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[5] In the magistrate judge's Report and Recommendation, adopted by the district court, the magistrate judge erroneously concludes that *Stone v. Powell* is not applicable to Huynh's Fourth Amendment claim and cites *Agee v. White*, 809 F.2d 1487 (11th Cir.1987) in support of this determination. R1-12-7. In *Agee*, however, we found that the petitioner had been denied full and fair consideration of one of his Fourth Amendment claims both at trial and on direct review. There are no allegations in this case that there were no avenues available to Huynh to review his Fourth Amendment claim at the state level or that the procedural mechanism through which Huynh's claim was reviewed was inadequate. Contrary to the magistrate judge's analysis, *Stone v. Powell* would preclude consideration of Huynh's Fourth Amendment claim in this circuit.

default. Trial counsel's purposeful strategy to erect such hurdles to consideration of a claim on federal collateral review can only be characterized as unreasonable.

Although our examination of the record permits us to evaluate counsel's performance with respect to competency in this case, we decline to apply the prejudice prong of the *Strickland* analysis without the benefit of a district court's factual findings on the merits of the underlying Fourth Amendment claim. While we readily conclude that the record indicates that a motion to suppress, had it been filed, would not have been frivolous, no court has issued findings regarding the legitimacy of the claim. Furthermore, although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim such as the one raised by Huynh, a good Fourth Amendment claim alone will not earn a prisoner federal habeas relief. *Kimmelman,* 477 U.S. at 382, 106 S. Ct. at 2586. Only those habeas petitioners who can prove under *Strickland* that they have been denied a fair trial by the gross incompetence of their attorneys will be granted the writ and will be entitled to retrial without the challenged evidence. *Id.*, 477 U.S. at 382, 106 S. Ct. at 2586-87. Because the merit of Huynh's Fourth Amendment claim is dispositive to a finding of prejudice, we remand to the district court for an evidentiary hearing to determine whether the search in question violated Huynh's Fourth Amendment right.[6] *Cave v. Singletary*, 971 F.2d 1513, 1516 (11th

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[6] If the district court finds that Huynh's Fourth Amendment right was violated and as a result that, had counsel filed a motion to exclude this evidence, it would have been granted, the court need not conduct any further analysis regarding whether there exists a reasonable probability that the verdict would have been different had the evidence seized from Huynh's wallet not been admitted. As we discuss in detail in the next section of this opinion, we conclude as a matter of law that, had the evidence in question been excluded, the outcome would have been different under the standards applicable to both *Strickland* and our review of the sufficiency of the evidence

Cir.1992) ("A petitioner is entitled to an evidentiary hearing in federal court if he alleges facts which, if proven, would entitle him to relief.").

B. Sufficiency of the Evidence

Huynh is entitled to habeas corpus relief if, upon the record evidence adduced at the trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 324, 99 S. Ct. 2781, 2791-92, 61 L. Ed. 2d 560 (1979). Under Georgia law, when a conviction is based solely on circumstantial evidence, "the proved facts shall not only be consistent with the hypothesis of guilt but shall exclude every other reasonable hypothesis save that of the guilt of the accused." O.C.G.A. § 24-4-6 (1995). The findings of fact by a state court of competent jurisdiction evidenced by reliable indicia are presumed to be correct. 28 U.S.C. § 2254(d) (1994).[7] The conclusions of the state court and district court as to whether the evidence was sufficient to satisfy federal due process standards is a mixed question of fact and law subject to plenary review. *Wilcox v. Ford*, 813 F.2d 1140, 1143 n. 3 (11th Cir.), *cert. denied*, 484 U.S. 925, 108 S. Ct. 287, 98 L. Ed. 2d 247 (1987). Huynh was convicted of having intentionally aided and abetted

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[7] There are eight exceptions to this presumption set forth in 28 U.S.C. § 2254(d). Because Huynh does not challenge directly the accuracy of the factual findings made by the state court, these exceptions are not relevant for purposes of this discussion.

Hong Binh Thai and Sam Van Ngo in the murder of C.A. Nguyen ("Nguyen").[8] At trial, Huynh contended that he was coerced to participate in events subsequent to Nguyen's murder; in essence, Huynh claimed (and continues to claim) that his participation was exclusively after-the-fact. Huynh correctly notes that under Georgia law, a defendant must be an accessory before-the-fact to be found guilty as an aider or abettor to a crime. *Purvis v. State*, 208 Ga. App. 653, 433 S.E.2d 58, 59, *cert. denied*, 208 Ga. App. 910 (1993). The following facts presented at trial are undisputed: the police found a .25 caliber bullet casing in the apartment of the victim and Huynh owned a .25 caliber weapon. Huynh drove Hong Binh Thai and Sam Van Ngo, with the victim's body in the back seat, to a wooded area where they disposed of the dead body. Hong Binh Thai subsequently gave Huynh $2,000.00, representing half of the money Sam Van Ngo gave to Hong Binh Thai after robbing Nguyen. Huynh and Hong Binh Thai were apprehended shortly thereafter in California. In a search conducted prior to his arrest, Huynh was found carrying thirteen one hundred dollar bills. Viewed in the light most favorable to the prosecution, we conclude that this evidence was sufficient to support Huynh's conviction.

We further conclude, however, that the evidence presented at trial concerning the money seized from Huynh immediately prior to his arrest was, at the very least, critical in pointing to his culpability as an accomplice to murder

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[8] O.C.G.A. § 16-2-20 provides, in relevant part:

(a) Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime.

b) A person is concerned in the commission of a crime only if he:

....

(3) Intentionally aids or abets in the commission of the crime[.]

before-the-fact. Sam Van Ngo testified that he had taken Huynh's weapon from his apartment and used it to murder Nguyen. He also testified that he had committed the murder and robbery alone and had ordered Huynh and Hong Binh Thai to assist him in disposing of the body. Huynh consistently has maintained that he had no knowledge that Sam Van Ngo intended to rob and kill Nguyen and that his participation after the murder took place under duress. The admission at trial of the money obtained from Huynh's wallet as a result of the allegedly illegal search was extraordinarily important in sustaining the prosecution's theory that Huynh intentionally had participated in a plan to murder Nguyen from the outset. Moreover, without the evidence of the money, the evidence presented at trial would not have been sufficient to exclude every other reasonable hypothesis save that of Huynh's guilt. We therefore resolve that if the district court finds, following the evidentiary hearing on the prejudice prong of Huynh's ineffective assistance of counsel claim, that the second pat-down search of Huynh leading to the discovery of the thirteen one hundred dollar bills violated his Fourth Amendment right and that, consequently, this evidence should have been suppressed at trial, then the evidence in this case was legally insufficient to convict Huynh of malice murder.[9] Stated differently, we conclude that if all evidence of the money had been excluded at trial, no rational trier of fact could have found Huynh guilty beyond a reasonable doubt of malice murder.[10]

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[9] Because we vacate Huynh's armed robbery conviction, *see infra* p. 3650, we need not reach the question of sufficiency of the evidence with respect to this offense.

[10] For the sake of clarity, we emphasize that under the particular circumstances of this case, the claims that counsel was ineffective and that the evidence was insufficient to convict Huynh of malice murder are inextricably intertwined; in fact, the court's determination with respect to the prejudice prong of Huynh's ineffective-assistance-of-counsel claim is

Double Jeopardy

Finally, Huynh asserts that he received multiple punishments for the same offense, thereby subjecting him to double jeopardy, when he was convicted and sentenced to consecutive life sentences for the greater offense of malice murder and the lesser included offense of armed robbery. He asks that we reverse his conviction and sentence for armed robbery. The State avers that (1) Huynh has never raised this particular double jeopardy claim in either state or federal court, (2) his state pleadings and original federal habeas petition stated only that he had been subjected to double jeopardy by being retried for felony murder, and (3) the claim presented in this appeal therefore is unexhausted. The State does not argue the merits of Huynh's double jeopardy challenge but asks that we decline to entertain the claim. We review Huynh's double jeopardy claim *de novo. Mars v. Mounts*, 895 F.2d 1348, 1351 (11th Cir.1990).

The State correctly notes that in his pro se petition before the district court, Huynh stated that "since he was not found guilty of felony murder in his first trial, he has been subjected to double jeopardy." R1-1. Huynh also stated that he "would like to use the brief filed in Georgia Supreme Court by trial attorney on this issue." *Id.* That brief contained

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dispositive of the sufficiency-of-the-evidence claim as a matter of law. The court necessarily must determine that Huynh's Fourth Amendment rights were violated and that the thirteen one hundred dollar bills should have been excluded from evidence in order to find that counsel's failure to file a motion to exclude this money prejudiced Huynh under *Strickland*. If the court finds that the money was improperly admitted and that Huynh therefore was prejudiced by his lawyer's failure to seek to have it excluded, then we conclude as a matter of law that the balance of the evidence was insufficient to support a conviction for malice murder. Theoretically speaking, if Huynh's counsel had filed the suppression motion (as he should have) and the trial court had granted the motion, then no rational trier of fact could have found Huynh guilty beyond a reasonable doubt of malice murder.

as one ground for appeal a request that the conviction for felony murder be reversed based on double jeopardy.[11] Exh. 6B at 22. In its answer to Huynh's petition, however, the State argued:

> To the extent the Petitioner argues that his conviction for felony murder and malice murder in the second trial constitutes double jeopardy, that argument is moot because the Georgia Supreme Court reversed and vacated the felony murder conviction . . . The remaining offenses for which Petitioner stands convicted, the offenses of malice murder and armed robbery, do not merge as a matter of law or fact in this case. Thus, the prohibition against double jeopardy is not implicated.

R1-7-11. We acknowledge that it is neither clear nor obvious that Huynh explicitly raised in his federal habeas petition the issue of whether his malice murder and armed robbery convictions merge in violation of double jeopardy; yet, the State apparently understood that there were several possible distinct interpretations of Huynh's double jeopardy claim. The answer indicates that the State afforded the pro se petition a liberal construction and expressly responded to the claim argued by Huynh in this appeal. Although the State now suggests that the brief discussion of the merger issue was inadvertent and gratuitous, we decline to find a claim to be unexhausted after the State has argued the merits of that same claim in its answer brief. *Pennington v. Spears*, 779

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[11] As previously mentioned, the Georgia Supreme Court had already reversed Huynh's felony-murder conviction after finding that the conviction constituted a violation of the Double Jeopardy Clause. *Huynh*, 373 S.E.2d at 503. The court also determined that Huynh had been sentenced only for malice murder and armed robbery and affirmed both the sentences and remaining convictions. *See id.*

F.2d 1505, 1506 (11th Cir.1986) (where State declined to raise exhaustion defense, instead requesting the district court to deny petition on the merits, court found State had waived exhaustion as a defense: "Although it is not clear from the record whether [petitioner] has in fact exhausted state remedies, it is clear that the state does not assert a defense of lack of exhaustion.").

We also conclude that Huynh's malice murder and armed robbery convictions merge under Georgia decisional law. The Georgia Supreme Court has construed Georgia statutory law as mandating that although a defendant may be prosecuted for each crime arising from the same conduct, he may not be convicted of more than one crime if one crime is included in the other. *Addison v. State,* 239 Ga. 622, 238 S.E.2d 411, 412-13 (1977). The court has further held that armed robbery may be a lesser included offense of malice murder where a defendant is a conspirator in an armed robbery scheme and a murder occurs as a probable consequence of that armed robbery. *Id.* Specifically, the court has vacated an armed robbery conviction after finding that "where the defendant is not the killer, and where the only method by which malice may be imputed to defendant is by showing his participation in the armed robbery, the armed robbery is an included offense as a matter of fact[.]" *Id.* 238 S.E.2d at 413.

Here, the State has never contended that Huynh was the "triggerman," and he was never charged with this offense; rather, it consistently has been the State's theory that Huynh was an accomplice who aided Sam Van Ngo in committing murder. As we have addressed in depth in the preceding discussion, the robbery of the victim in this case was the critical evidence in allowing the jury to impute the malice and intent of Sam Van Ngo to Huynh. Proof of the robbery therefore was essential in supporting Huynh's conviction for malice murder. *Burke v. State,* 234 Ga. 512, 216 S.E.2d 812,

814 (1975). Our precedent dictates that the Double Jeopardy Clause prohibits the state from punishing a person twice for the same offense, and a greater offense and lesser included offense are considered the same offense for purposes of Double Jeopardy Clause protection. *United States v. Kaiser*, 893 F.2d 1300, 1303 (11th Cir.1990). The specific facts of this case dictate that, under Georgia law, the armed robbery for which Huynh was convicted was a lesser included offense of the malice murder for which he was convicted. [12] Accordingly, we vacate the district court's order and direct that the writ issue with respect to Huynh's conviction and sentence for armed robbery.

III. CONCLUSION

In this appeal, Huynh asks that we grant the writ of habeas corpus with respect to his convictions and sentences for malice murder and armed robbery. As grounds for this request, he avers that his trial counsel was ineffective and that the evidence was insufficient to support the convictions. In addition, Huynh asks that we vacate his conviction and sentence for armed robbery based on a violation of the Double Jeopardy Clause. We conclude that Huynh has shown that counsel's performance at trial regarding the decision to delay filing a potentially meritorious motion to suppress was neither sound strategy nor reasonable in light of prevailing professional norms. We therefore vacate the district court's judgment regarding the ineffective assistance of counsel claim and remand for an evidentiary hearing to resolve whether Huynh was prejudiced by counsel's performance. We further conclude that if the district court finds, pursuant to its examination of the ineffective

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[12] The Georgia Supreme Court has observed that an armed robbery may be a lesser included offense "as a matter of fact, though not as a matter of law" based on the factual circumstances of each case. *Addison*, 238 S.E.2d at 413.

assistance of counsel issue, that Huynh established a valid Fourth Amendment claim and that the money discovered as a result of the relevant search should not have been introduced at trial, then the evidence was legally insufficient to support his conviction and the writ should issue forthwith. Finally, we resolve that Huynh's conviction and sentence for armed robbery subjected him to double jeopardy. We therefore reverse the district court's order with respect to this claim and direct that the writ issue on the armed robbery conviction and sentence.

VACATED in part, REVERSED in part, and REMANDED with instructions.

APPENDIX E

SUPREME COURT OF GEORGIA

No. 46033

VAN HUYNH

v.

THE STATE

258 Ga. 663; 373 S.E.2d 502; 1988 Ga. LEXIS 476

November 9, 1988, Decided

COUNSEL: Whitmer & Law, G. Hammond Law III, for appellant.

C. Andrew Fuller, District Attorney, Michael J. Bowers, Attorney General, Andrew S. Ree, for appellee.

JUDGES: Clarke, Presiding Justice. All the Justices concur.

OPINION BY: CLARKE

OPINION

Appellant was convicted of malice murder, felony murder, and armed robbery and sentenced to consecutive life sentences for malice murder and armed robbery.[1] Appellant

[1] The crimes were committed December 20, 1985, and defendant was convicted October 17, 1986. On January 13, 1987, after a notice of appeal had already been filed, the trial court granted an extraordinary motion for new trial. The original conviction was affirmed in *Tho Van Huynh v. State*, 257 Ga. 375 (359 S.E.2d 667) (1987). Appellant was retried November 16-20, 1987. He was convicted of felony murder, malice murder, and armed robbery and sentenced to consecutive life sentences for malice

and Hong Binh Thai accompanied Sam Van Ngo to his apartment in Gainesville, Georgia. The victim, Ca Nguyen, lived with Sam Van Ngo and was watching television in the apartment. Soon after their arrival Sam Van Ngo shot the victim with a .25 caliber automatic weapon of the same model and caliber as one owned by appellant. Hong Binh Thai assisted him in putting the body into the car and in disposing of it in the woods. Appellant drove the car on the trip to dispose of the body. Over twelve thousand dollars which the victim had withdrawn from a savings account was taken from his body by Hong Binh Thai during the drive to the woods. After disposing of the body they drove to a lake where Sam Van Ngo and Hong Binh Thai threw away the murder weapon and washed their hands. Then they returned to Gainesville where the appellant stayed in the apartment which he shared with Hong Binh Thai while Hong Binh Thai drove Sam Van Ngo to the Atlanta airport. When Hong Binh Thai returned to Gainesville he gave appellant two thousand dollars, half of what Sam Van Ngo had given him of the stolen money. Appellant was arrested in California some two weeks after the crimes. At the time of his arrest he had thirteen one hundred dollar bills on his person.

1. In his first enumeration of error appellant contends that the evidence was insufficient to convict him of murder and armed robbery. He insists that he had no knowledge of a plan to murder and rob the victim and that his help in disposing of the body and in driving Sam Van Ngo to the airport was given under duress. However, there was evidence from which the jury could have concluded that he was a participant in a criminal enterprise which included the

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murder and armed robbery on November 20, 1987. The notice of appeal was filed December 2, 1987. The transcript was certified July 15, 1988, and the case was docketed in this court July 22, 1988. The appeal was submitted for opinion September 2, 1988.

murder and robbery of the victim. A person who is a party to the crime as defined by OCGA § 16-2-20 may be found guilty of the crime even though not the actual perpetrator. *Satterfield v. State*, 256 Ga. 593 (351 S.E.2d 625) (1987); *Cargill v. State*, 256 Ga. 252 (347 S.E.2d 559)(1986). Considering the evidence in the light most favorable to the prosecution, it was sufficient to convince any rational trier of fact of the elements of the crimes beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307 (99 S. Ct. 2781, 61 L. Ed. 2d 560) (1979). This is true even though appellant was not the triggerman.

2. Appellant contends that the court erred in failing to grant his motion to suppress the money which was found by California police on appellant's person. The court dismissed the motion as untimely because it was not filed until November 16, 1987, the day of his trial. Uniform Superior Court Rule 31.1 requires that all motions be filed at or before arraignment unless the time is extended by the judge. Further, OCGA § 17-5-30 has been interpreted by this court as requiring that motions be filed by the time of arraignment. *Waller v. State*, 251 Ga. 124 (303 S.E.2d 437) (1983), *rev'd* on other grounds in *Waller v. Georgia*, 467 U.S. 39 (1984); *Lazarz v. State*, 187 Ga. App. 107 (369 S.E.2d 355) (1988). Therefore, this enumeration is without merit.

3. The appellant's final enumeration of error is that since he was not found guilty of felony murder in his first trial, he has been subjected to double jeopardy. He is correct in this contention. However, since he was sentenced only for malice murder and armed robbery, the sentence may stand even though the conviction for felony murder must be reversed.

Judgment reversed as to felony murder, affirmed as to malice murder, armed robbery, and the sentence.

APPENDIX F

SUPREME COURT OF GEORGIA

No. 44649

VAN HUYNH

v.

THE STATE

257 Ga. 375; 359 S.E.2d 667; 1987 Ga. LEXIS 868

September 9, 1987, Decided

COUNSEL: G. Hammond Law III, for appellant.

Andrew C. Fuller, District Attorney, Michael J. Bowers, Attorney General, for appellee.

JUDGES: Marshall, Chief Justice. All the Justices concur.

OPINION BY: MARSHALL

OPINION

Tho Van Huynh (Tho) appeals from his conviction of the malice murder and armed robbery of Ca Nguyen, for which he was sentenced to two consecutive life-imprisonment terms.[1] The sole enumerated error is the

[1] The crimes were committed on December 20, 1985, and the defendant was convicted on October 17, 1986. A direct notice of appeal from the convictions was filed on October 22, 1986. On November 17, 1986, the defendant filed a motion for new trial on the general grounds. On November 24, 1986, he amended his motion for new trial to include the ground of newly-discovered evidence. The transcript of evidence was certified on December 30, 1986, and filed on January 23, 1987. The trial

alleged insufficiency of the evidence to authorize the conviction. We affirm.

Evidence was adduced at the trial to the following effect. The victim, Ca Nguyen (Ca), was a Vietnamese immigrant who fled his homeland on a homemade raft after the Communists overthrew the government of South Vietnam. Ca came to the United States and settled in Gainesville, Ga. He was industrious, and worked at several jobs in hope of someday accumulating enough wealth so that he could obtain the release of his family he had left behind, by bribing the appropriate Vietnamese government officials or by buying a boat to attempt a rescue.

Several days prior to his death, Ca withdrew, in denomination of $100 bills, the $12,497.60 he had saved with the intention of celebrating Christmas with friends in Seattle, Wash., and planning his family's escape.

At around 2:30 p.m. on December 20, 1985, co-defendants Sam Van Ngo (Sam) and Hong Binh Thai (Hong), a juvenile, met the appellant at his house to celebrate his birthday. The three of them left the party together at 4:00 p.m. after the appellant informed his girl friend, Tammy Bennett, that he was taking Sam to the Atlanta Airport for a flight. Sam already had his luggage in his possession.

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court held that it could not pass on the general grounds because the previously filed notice of appeal had divested the court of jurisdiction, but construed the motion for new trial as amended as an extraordinary motion for new trial on the ground of newly-discovered evidence, of which it did have jurisdiction notwithstanding the previous filing of the notice of appeal. On January 13, 1987, the trial court granted the extraordinary motion for new trial. On March 20, 1987, this Court dismissed the state's appeal from the order granting a new trial, for failure to comply with OCGA § 5-6-34 (b). State v. Tho Van Huynh, Case No. 44347. The record was docketed here on May 6, 1987, and after briefs were filed, the case was submitted on June 19, 1987, without oral argument.

However, prior to going to the Atlanta Airport, the three co-defendants stopped at Ca's house. Ca was shot once in the head as he lay on the sofa, in an execution-style murder by Sam, with a gun of the same model and caliber that the appellant owned. The appellant was present when the victim was murdered. Ca was subsequently robbed of his $12,497.60. The appellant got into his automobile, started the engine, and waited for his accomplices, co-defendants Sam and Hong, to carry the victim's body out of the house. Ca's body was placed inside the appellant's automobile, and the appellant drove the body and his two co-defendants to a location in Forsyth County. Hong and Sam disposed of Ca's body by hiding it in a wooded area. Sam was subsequently driven to the Atlanta Airport, where he gave Hong and the appellant $4,000 of the proceeds from the armed robbery.

The bloodied sofa was discovered within six hours of the shooting. A Hall County deputy questioned the appellant as to the location of either Sam or Ca, but he denied any knowledge of their whereabouts.

The appellant fled from this jurisdiction two days later, and was captured by law-enforcement officers in Fremont, Cal., on January 8, 1986. He had in his possession 31 $100 bills at the time of his arrest. Co-defendant Hong was also apprehended on that day in Fremont, and was found in possession of $1,083, being comprised of ten $100 bills and assorted smaller bills. The appellant's automobile was impounded and searched, and the Fremont police recovered $750 in bills and receipts accumulated during the flight from Georgia, and they seized the rear car seat, which had been sprayed with red paint to cover blood stains of the deceased's.

Co-defendant Sam pleaded guilty to the offenses of malice murder and armed robbery on November 17, 1986,

and was sentenced to two consecutive life-imprisonment terms.

"Under OCGA § 16-2-20, participants to a crime may be convicted of a crime even though they are not the actual perpetrator. 'It matters not whether it was the appellant or (his accomplice) who actually fired the gun during the robbery which resulted in [Ca's] death. The act of one was the act of the other in the commission of the armed robbery and the ensuing death which resulted therefrom.' *Strong v. State*, 232 Ga. 294, 298 (206 SE2d 461) (1974). Accord *Cargill v. State*, 256 Ga. 252 (1) (347 SE2d 559) (1986)." *Lobdell v. State*, 256 Ga. 769, 771 (353 SE2d 799) (1987). Although the appellant here was not the triggerman, there was evidence which authorized findings that he was present with the triggerman for over two hours prior to the murder; that he drove the triggerman to the victim's house; that he was present in the room when the victim was shot; that the victim was shot with a gun of the same model and caliber that the appellant owned; and that the appellant destroyed evidence, assisted in the disposal of the decedent's body, fled from the jurisdiction where the crimes were committed, reaped benefits from the armed robbery, and at no time made any attempt to disassociate himself from the criminal enterprise. Having reviewed the evidence in the light most favorable to the jury's determination, we conclude that a rational trier of fact could have found the defendant guilty of the crimes of which he was convicted beyond a reasonable doubt. *Jackson v. Virginia*, 443 U. S. 307 (99 SC 2781, 61 LE2d 560) (1979).

Judgment affirmed.